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AFFIRMATIVE ACTION

of 93

JOINT OVERSIGHT HEARINGS

BEFORE THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

AND THE

SUBCOMMITTEE ON
EMPLOYMENT OPPORTUNITIES

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

ON

AFFIRMATIVE ACTION

JULY 10 AND 11, 1985

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AFFIRMATIVE ACTION

WEDNESDAY, JULY 10, 1985

House of Representatives,
Subcommittee on Civil and Constitutional Rights,
Committee on the Judiciary,
and
Subcommittee on Employment Opportunities,
Committee on Education and Labor,
Washington, DC.

The subcommittees met, pursuant to call, at 9:40 a.m., in room 2237, Rayburn House Office Building, Hon. Matthew G. Martinez (chairman of the Subcommittee on Employment Opportunities) presiding.

Present: Representatives Martinez, Edwards, Hawkins, Conyers, Sensenbrenner, Dannemeyer, and Gunderson.

Staff present: Eric P. Jensen, acting staff director; Paul Cano, legislative assistant; Genevieve Galbreath, chief clerk/staff assistant; Patricia L. Kelly, staff assistant; Beth Buehlmann, Republican staff director for education, of the Subcommittee on Employment Opportunities of the Committee on Education and Labor; Stuart Ishimaru, assistant counsel; and Philip Kiko, associate counsel; of the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary.

Mr. Martinez. This meeting will come to order, please.

This is a joint hearing between the Subcommittee on Employment Opportunities and the Subcommittee on Civil and Constitutional Rights, a subcommittee of the Judiciary Committee.

We have with us today as members of the Subcommittee on Civil and Constitutional Rights Mr. Sensenbrenner and Don Edwards, the chairman. We have with us from the Subcommittee on Employment Opportunities the chairman of the Education and Labor Committee, Gus Hawkins.

With that, I'll get into my statement to open this meeting.

It has been over 30 years since the Supreme Court in *Brown* v. *Board of Education* first decided that racial discrimination in our country would no longer be tolerated and some 17 years since the High Court ruled that race-conscious remedies were constitutional and necessary in order to reverse the invidious effects of discrimination.

Today, we are once again at the crossroads of the civil rights struggle. In the few short years since the passing and the brief implementation of the civil rights laws, the will to follow through on the enforcement of full equal opportunity has suddenly turned.

Since the Reagan administration took office 4½ years ago, the Nation's civil rights laws have suffered a series of setbacks under the open efforts of the administration to reverse their meaning and their application on behalf of the minority victims of our society.

The administration has sold the public on the perception that discrimination in the workplace no longer exists; that minorities are now the preferred workers in our society and, by that implication, that all job opportunities are now flowing to the minorities; that minorities are not discriminated against as a group of people but only as isolated individuals; and, finally, that white males in this society are real victims of discrimination who deserve the major benefit of administration enforcement and program handouts.

I think this administration has turned reality on its head, and the worst thing is that I believe the American public is buying this horrible lie.

The hearings today and tomorrow will focus on the heart of the current debate on civil rights, affirmative action policies especially. Today's first hearing will examine the utility of affirmative action in broadening employee selection base and improving job mobility as a response to the previous discrimination.

Tomorrow's hearing will focus on the validity of affirmative action remedies and their continued use in employment policies aimed at remedying discrimination.

I'm deeply honored to be holding these vital hearings in conjunction with the Judiciary Subcommittee on Civil and Constitutional Rights, and I'm further delighted to be sharing the gavel for these joint hearings with my esteemed colleague from California's 10th District, Chairman Don Edwards.

Mr. Edwards, do you have a statement?

Mr. **Edwards**. Mr. Chairman, I thank you for your opening statement, which makes some very important points, and certainly affirmative action is a very key part of civil rights. I certainly agree with every word you have said, and I compliment you, Mr. Chairman, and of course the chairman of the full committee, the gentleman from California, Mr. Hawkins, for holding these hearings on this very, very important issue.

I ask that, without objection, my full statement can be made part of the record.

Mr. **Martinez**. If there is no objection, it is so ordered.

[The statement of Mr. Edwards follows:]

OPENING STATEMENT
CONGRESSMAN DON EDWARDS
JULY 10, 1985

Our Nation's struggle to eliminate discrimination based on race or sex has a long and checkered history. In 1941, President Franklin D. Roosevelt issued the first in a series of Executive Orders to eliminate discrimination in employment. Despite additional Executive Orders by Presidents Roosevelt, Truman, and Eisenhower, little progress was made in reducing discrimination by federal contractors.

In 1961, President John F. Kennedy issued the first Executive Order setting forth national policy to encourage federal contractors to undertake affirmative action to afford equal employment opportunities by positive measures. In 1964, when Congress passed the Civil Rights Act, the title proscribing race or sex discrimination in employment, Title VII, included the use of affirmative action as a remedy.

At first, affirmative action had a vague and open ended definition. As Edward C. Sylvester, Jr., the Director of the Office of Federal Contract Compliance said in 1967

> There is no fixed and firm definition of affirmative action. I would say that in a general way, affirmative action is anything you have to do to get results.... Affirmative action is really designed to get employers to apply the same kind of imagination and ingenuity that they apply to any other phase of their operation.

In 1967, the OFCCP began to require certain employers to submit affirmative action plans as part of their obligation as federal contractors. Some contractors used "manning tables", setting numerical goals and timetables for the hiring of minorities. In 1968, the Comptroller General objected to the submission requirement because it did not contain the certainty required for federal contractors.

In 1969, the Nixon Administration moved to reinstitute the use of race-conscious remedies, using numerical goals and timetables. Since then, under both Republican and Democratic Administrations, affirmative action has used numerical goals and timetables as an integral part.

Under the Reagan Administrationm, goals and timetables have come under attack. Calling them "quotas" which "discriminate against white males," the Administration has moved for their elimination.

I am especially pleased to welcome our witnesses this morning. They represent a broad spectrum of American life: employers and employees, plus those who have engaed in intensive study of the issue. We will hear their experiences and learn whether affirmative action is still necessary and whether it has worked. Tomorrow we will hear from legal experts, the Administration and mayors' groups on the implications of the Stotts decision, and from Carl Stotts, the lead plaintiff in the case.

I am especially pleased to welcome our first witness this morning, Professor Jonathan Leonard of the University of California, Berkeley. Professor Leonard presented excellent testimony before our Subcommittee, in 1983, on affirmative action in the federal government. He has written extensively on the subject of affirmative action, and his works were widely referred to, with approval, in Special Analysis J of the President's 1986 Budget, the section on Civil Rights Activities. Special Analysis J said Professor Leonard's study proved that affirmative is not effective in the battle against employment discrimination and that affirmative action may in fact restrict opportunities for minorities and women.

I look forward to your testimony Professor Leonard, as well as the other witnesses this morning.

Mr. **Martinez**. Mr. Sensenbrenner.

Mr. **Sensenbrenner**. Thank you very much.

Once again, the committee is swimming upstream against what the American public feels is right and just, notwithstanding the fact that Title VII of the Civil Rights Act and the 14th and 15th amendments to the U.S. Constitution were intended to be applied in a colorblind fashion.

The continuing controversy over affirmative action is a result of executive branch policies and regulations and judge-made law that require or permit the use of quotas, timetables, ratios, or numerical objectives on the basis of race, color, sex, or national origin.

Affirmative action is now defined to encompass policies which identify discriminatory conduct on the basis purely of statistical evidence and disparate effects rather than on the basis of some demonstration or discriminatory intent or purpose or motivation. It is defined in terms of group rights, not individual rights. Reverse discrimination is OK to remedy past discrimination.

Some civil rights activists, such as Commissioners Mary Frances Berry and Blandina Ramirez, have gone so far to state in a Civil Rights Commission publication that,

> In their statement concerning *Stotts*, once again our colleagues insist on putting blinders on society concerning the tragic present and past effects of discrimination. Civil rights laws were not passed to give civil rights protection to all Americans, as the majority of this Commission seems to believe.

I intend to pursue this discussion further during these hearings. The Reagan administration, the current Civil Rights Commission, and myself advocate the application of our civil rights laws in a colorblind manner. Reverse discrimination is exemplified in race-conscious quotas, timetables, and other methods which are contrary to our constitutional framework and the intent of Congress when title VII was enacted.

In the *Stotts* v. *Memphis Firefighters* case, the U.S. Supreme Court stated that the purpose of the remedial section of Title VII, section 706(g), is "to provide make whole relief only to those who have been actual victims of discrimination."

Extensive legislative history was quoted to support this position. For example, the Supreme Court quoted a memorandum by the principal Republican House sponsors of Title VII which stated, "Title VII does not permit the ordering of racial quotas in businesses or unions."

A year and a half ago, the Anti-Defamation League of B'nai B'rith released a survey in which it found that 73 percent of all respondents disapproved of giving minorities special advantage to correct past discrimination. The survey also found that 52 percent of the minority respondents felt employers should have the most qualified applicants.

In conclusion, the minority of this subcommittee was informed of these hearings just 2 days ago. Thus, the minority had absolutely no input whatsoever into the selection of witnesses.

Pursuant to the House rules, I intend to ask for a minority day of hearings on affirmative action unless we are given assurances by the chairman that there will be a third day of hearings in which the minority may invite its own witnesses.

It is my understanding that this was an oversight, but I have strong feelings on this issue, as do the other minority members, and we would like to explore the opportunity to present witnesses in this area, witnesses that are not singing out of the same hymnbook.

It seems to me that this subcommittee, which has the job of safeguarding minority rights, turns around and tramples on the rights of the minority that they have to deal with on a day-to-day basis, and that's the Republican members of this subcommittee. I'm getting the impression more and more that the motto of the majority party on this subcommittee in the area of civil rights is, "Do as I say, not do as I do."

I would also ask in the future that the minority be consulted prior to a final date being set for hearings, and at this point I would ask unanimous consent to insert at this point in the record three documents: First, a January 1985 monograph by the U.S. Commission on Civil Rights entitled "Toward an Understanding of Stotts"; second, a January 17, 1984, document entitled "Statement of the U.S. Commission on Civil Rights concerning the Detroit Police Department's Racial Promotion Quotas"; and third, an article written by Carl Hoffman and John Shelton Reed entitled "Sex Discrimination? The XYZ Affair."

Mr. **Martinez**. Are there any objections?

If not, it is so ordered.

[The documents follow:]

Toward an Understanding of *Stotts*

United States Commission on Civil Rights
Clearinghouse Publication 85

January 1985

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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Toward an Understanding of *Stotts*

United States Commission on Civil Rights
Clearinghouse Publication 85

January 1985

Preface

On June 12, 1984, the United States Supreme Court handed down a major civil rights decision, *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984). The decision has generated public controversy and fueled already existing debate on a court's authority to order relief under Title VII of the Civil Rights Act of 1964 to remedy discrimination in employment. As the introduction in this publication explains, the Court said in *Stotts* that a court may not, under Title VII, order an employer to lay off employees with greater seniority in favor of employees with lesser seniority, in disregard of a bona fide seniority system, for the purpose of preserving a certain percentage of a racial minority in the work force. There is dispute about the extent to which this decision applies to other employment decisions, such as hiring and promotion. Many observers have focused on whether the decision spells an end to the use of quotas and other preferential treatment in court-ordered relief under Title VII and requires that a court extend relief only to actual victims of an employer's discrimination. Clear answers to these and related questions on this pivotal civil rights issue are needed.

The Office of General Counsel prepared this publication. In the past, this agency has disseminated publications discussing important Supreme Court cases, such as *Toward an Understanding of Bakke* (May 1979). This publication is intended to increase public understanding of the scope of a court's authority to order relief under Title VII for discrimination in employment by making readily available the complete text of the *Stotts* decision, a brief introduction to the case, a detailed case summary of the opinion, an analysis of the meaning and significance of the *Stotts* decision, the Commission's statement on the Detroit Police Department's racial promotion quota, and the Commission's statement on the *Stotts* decision. The publication also includes the concurring and dissenting statements of individual Commissioners and an exchange concerning the *Stotts* decision previously printed in the *New York Times*. This publication was prepared in the hope that its widespread dissemination will contribute to an informed public understanding of the critical issue of the scope of a court's authority under Title VII to remedy employment discrimination.

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Introduction

On June 12, 1984, the United States Supreme Court issued a major decision in civil rights law. *Firefighters Local Union No. 1784* v. *Stotts* concerned an issue that has recently captured great public interest, namely, the extent to which seniority systems may or must be overridden as part of court-ordered relief to remedy discrimination in employment. A majority of the Court held that, under Title VII of the Civil Rights Act of 1964, a court may not order an employer to lay off more senior employees in favor of less senior employees on the basis of race, in derogation of a bona fide seniority system, for the purpose of preserving a specific percentage of racial minority employees.[1] Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin.[2]

The case did not concern hiring or promotion decisions by employers. The case, however, is highly important because the Supreme Court's interpretation of the scope of a court's remedial authority under Title VII significantly affects a trial court's remedial authority respecting hiring and promotions. A pivotal basis for the result reached by the Court in *Stotts* is that, under Title VII, a court may extend relief for past employment discrimination only to actual victims of an employer's discrimination. Much debate concerns the effect of this interpretation of Title VII on affirmative action remedies, such as quotas, that may be ordered by a court. A reasoned analysis of the Court's decision in *Stotts* leads to the conclusion that quotas or other devices which benefit nonvictims of an employer's discrimination are not permissible court-ordered relief for employment discrimination in any phase of the employment relationship—hiring, promotion, or layoff—under Title VII. Relief under Title VII, then, may include only an injunction to end all discriminatory employment practices, make-whole relief for actual victims of an employer's discrimination, and nondiscriminatory affirmative action such as increased recruiting.

At the time of the *Stotts* decision, many lower court orders in Title VII cases provided for layoffs on the basis of race as a means of preserving a particular remedy for discrimination, whether or not the persons benefited by the preferential layoffs had ever been discriminated against by the employer. Many of these orders are expected to be challenged on the basis of *Stotts*. Other cases in which a court has ordered hiring or promotion of employees on the basis of race, without regard to whether the person preferentially hired or promoted has ever been a victim of discrimination, will also undoubtedly be challenged.

The facts in *Stotts* are important to an understanding of the conclusions reached by the Court. In 1977 Carl Stotts, a black firefighter in the Memphis, Tennessee, Fire Department, brought a class action lawsuit in a Federal district court. He alleged that the department and various city officials had engaged in discriminatory hiring and promotion practices in violation of Title VII of the Civil Rights Act of 1964. In 1980 the court entered a consent decree (an order to which the parties have agreed) requiring backpay for and promotion of various individuals. The decree also required that the percentage of black employees in each job classification in the department be increased to the proportion of blacks in the local labor force. The court retained jurisdiction to enter any other orders that would be necessary to carry out the consent decree. The consent decree contained no provisions regarding layoffs or award of seniority. The 1980 decree paralleled a 1974 decree that settled a discrimination case brought against all departments of the city by the United States.

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[1] The Supreme Court reversed the judgment of the court of appeals by a vote of 6-3. Five of the six Justices joined in the majority opinion. The sixth Justice, Justice Stevens, issued a separate concurring opinion, voting for reversal on narrower grounds than the five other Justices.

[2] 42 U.S.C. §2000e *et seq.* (1982).

In 1981, as a result of budget problems, the city planned to lay off employees of the fire department on the basis of the city's "last-hired, first-fired" rule, adopted earlier in a "memorandum of understanding" between the city and the Firefighters Union. Black firefighters asked the court to prohibit the layoff of black employees. The court ordered the city not to apply its seniority policy in a manner that would reduce the percentage of blacks in the department. On appeal, the United States Court of Appeals for the Sixth Circuit upheld the district court order, and the case was then appealed to the United States Supreme Court.

In an opinion by Justice White, the Supreme Court disposed of several issues, including determining that the case was not moot[1] and analyzing the meaning and impact of the consent decree. These issues are discussed in greater detail in the case summary portion of this publication.

The Court then considered the most far-reaching and thoroughly discussed argument in favor of the lower court's order preventing the city from using its seniority policy in a manner that would reduce the percentage of blacks in the fire department. The argument was that if Stotts had proven at trial that the fire department and city officials had engaged in discriminatory hiring and promotion practices, the court could have ordered the relief it did in prohibiting the layoffs of less senior black employees over more senior white employees. The Supreme Court said, however, that the lower court had no authority to disregard the seniority system unless the system itself was intentionally discriminatory. Moreover, although a court could order competitive seniority relief for actual victims of discrimination in order to restore them to their rightful place in the seniority system, mere membership in the disadvantaged class was an insufficient basis for judicial relief. The Court said that the Memphis seniority system was not intentionally discriminatory and that there was no finding that any of the blacks who were protected from the layoffs had been actual victims of discrimination.

The Court noted that section 703(h) of Title VII permits the routine application of bona fide seniority systems so long as there is no intention to discriminate on a prohibited basis. Significantly, the Court also noted that the conclusion that a court can award seniority only to a person who has been a victim of illegal discrimination is consistent with the policy behind section 706(g) of Title VII, which governs remedies available in Title VII cases generally, including in the hiring and promotion phases of the employment relationship. The Court stated that the policy behind section 706(g) is to provide relief only to actual victims of discrimination. The Court cited key legislative history from the Civil Rights Act of 1964 and the 1972 amendments to Title VII supporting its interpretation. Since none of the rationales supported the order of the lower court, the Supreme Court reversed that decision and permitted the application of the seniority policy. Its decision, although addressing a layoff situation, is equally applicable to other aspects of the employment relationship such as hiring and promotion. Justice White's majority opinion is fully discussed in the case summary section.

The concurring opinions of Justices O'Connor and Stevens, and Justice Blackmun's dissenting opinion, which was joined by Justices Brennan and Marshall, are also described in the case summary.

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[1] A case is moot when there is no longer a concrete controversy or real dispute between the parties. Federal courts are not permitted to decide moot cases. *See* U.S. Const. art. III.

Case Summary

In *Firefighters Local Union No. 1784* v. *Stotts*,[1] five Justices of the U.S. Supreme Court[2] decided that a consent decree, between the city of Memphis and black firefighters remedying alleged violations of Title VII of the Civil Rights Act of 1964 in hiring and promotions, does not give a district court authority to enjoin layoffs undertaken in accordance with a seniority system that is "bona fide" and not adopted and applied with an intent to discriminate on the basis of race. Thus, the decision reversed the judgment of the Court of Appeals for the Sixth Circuit, which had upheld a lower court order enjoining the city from applying its seniority policy in a manner decreasing the percentage of blacks then in the fire department. The Court construed section 703(h)[3] of Title VII to insulate such "last-hired, first-fired" procedures from legal challenge under Title VII and stated that this ruling is consistent with the "policy" behind section 706(g),[4] which is to provide make-whole relief, such as awards of competitive seniority, only to the actual victims of illegal discrimination.

Justice Stevens concurred in the Court's judgment based on his reading of the consent decree at issue, but did not find that the case required reaching any Title VII issues. Justice O'Connor, in addition to joining the majority's opinion, issued a concurring opinion. Justice Blackmun, joined by Justices Brennan and Marshall, dissented on the grounds that the case was moot and that the district court had authority under both the consent decree and Title VII to issue a preliminary injunction to prevent decreasing the percentage of black firefighters then employed.

Factual Background

In 1977 the respondent, Carl Stotts, a black firefighter in the Memphis, Tennessee, Fire Department, filed a class action lawsuit in a Federal district court alleging that the Memphis Fire Department and various city officials had engaged in a pattern and practice of making racially discriminatory hiring and promotion decisions in violation of Title VII of the Civil Rights Act of 1964. Following settlement negotiations, a consent decree, designed to remedy hiring and promotion practices with respect to blacks, was approved and entered by the court on April 25, 1980. Under the decree, the city denied that it had violated any laws, but agreed to promote 13 named individuals, to provide backpay to 81 employees of the fire department, and to adopt a long-term goal of increasing the proportion of minority representation in each job classification to approximately the proportion of blacks in the labor force in Shelby County, Tennessee. The district court retained jurisdiction "for such further orders as may be necessary or appropriate to effectuate the purposes of this decree." *Firefighters Local Union No. 1784* v. *Stotts*, 104 S.Ct. 2576, 2581, *rev'ing* 679 F.2d 541 (6th Cir. 1982).

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[1] 104 S.Ct. 2576 (1984).

[2] Justice White wrote the majority opinion, joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor.

[3] Section 703(h) provides in relevant part:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . .provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

42 U.S.C. §2000e–2(h) (1982).

[4] Section 706(g) governs the remedies available in Title VII litigation and provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in such unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . or any other equitable relief as the court deems appropriate. . . .No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of §704(a) of this title.

42 U.S.C. §2000e–5(g) (1982).

The 1980 decree paralleled a 1974 consent decree that the city had signed after the United States brought a suit against it for discriminatory hiring practices. Neither of the decrees contained provisions for layoffs or demotions, or awarded competitive seniority. The 1974 decree did require, however, that "for purposes of promotion, transfer, and assignment, seniority was to be computed 'as the total seniority of that person with the City.'" *Id.* at 2581. Between 1974 and 1980, blacks made up 56 percent of the employees hired in the fire department, and the overall percentage of black employees increased from 3 or 4 percent to 11½ percent. *Id.* at 2582.

In May of 1981, as a result of expected budget deficits, the city planned to lay off nonessential personnel throughout the city government based on the city's "last-hired, first-fired" rule. The plan permitted a senior employee whose position was abolished to "bump down" to a lower ranking position to avoid being laid off. *Id.* at 2582. The layoff policy was adopted pursuant to a 1975 "memorandum of understanding" between the city and the Firefighters Union. *Id.* at 2582, 2585 n.7.

On May 4, 1981, the respondents requested the district court to prohibit the layoff of black employees. The union, which was not a party to either of the decrees, intervened. Shortly thereafter, the district court enjoined the city from applying its seniority policy insofar as it decreased the percentage of black firefighters employed at that time. The court based its injunction on the premise that, although the seniority-based layoff procedure was not adopted with any intent to discriminate, its implementation would have a racially discriminatory effect (15 of 40 workers to be laid off would have been black), and that the seniority system was not bona fide. The city then implemented a modified layoff plan in conformity with the injunction, which resulted in three whites being laid off while three blacks with less seniority were retained. *Id.* at 2852 n.2.

The Court of Appeals for the Sixth Circuit found that the district court erred in holding that the city's seniority system was not bona fide. Nonetheless, it held that the modification of the 1980 decree was "permissible under general contract principles because the City 'contracted' to provide 'a substantial increase in the number of minorities in supervisory positions' and the layoffs would breach that contract." *Id.* at 2582. Alternatively, the appellate court ruled that, due to unforeseen circumstances that created a hardship for one of the parties to the decree, the district court was authorized to modify the decree. Finally, the court of appeals rejected the argument that the modification was improper because it conflicted with the city's seniority plan, allegedly immunized under section 703(h) of Title VII.

Mootness

The initial part of the Supreme Court's analysis gave several reasons for finding that the case was not rendered moot[1] even though all of the white employees who were affected by the injunction were restored to duty after 1 month or offered their former positions.

First, the Court ruled that the district court's injunction forbidding layoffs by seniority was still in force and "unless set aside must be complied with in connection with any future layoffs." *Id.* at 2583. Second the Court stated that the district court had ruled that the 1980 consent decree must be construed to mean that layoffs were not to reduce the percentage of blacks employed in the fire department and that the city's seniority provisions must be disregarded for the purpose of maintaining such percentages. If these rulings were left intact, "the City [would] no longer be able to promise current or future employees that layoffs will be conducted solely on the basis of seniority. . . [which] has traditionally been, and continues to be, a matter of great concern to American workers." *Id.* at 2583–84 n.4. Third, the Court found that the judgment would have a "continuing effect" on the city's management of the department because white employees who were laid off or demoted might have "make whole" claims for losses in pay and seniority. Although the amounts involved might be small, the need to resolve the rights of these individuals gives all parties a "concrete interest in the outcome of the litigation. . . ." *Id.* at 2584. The Court concluded: "Respondents cannot invoke the jurisdiction of a federal court to obtain a favorable modification of a consent decree and then insulate that ruling from appellate review by claiming they are no longer interested in the matter, particularly when the modification continues to have adverse effects on the other parties to the action." *Id.* at 2585.

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[1] A case is "moot" when the parties no longer have a concrete interest in its outcome, rendering the Court's opinion advisory in nature rather than decisive of an actual "case or controversy" between the parties. Federal courts may not decide moot cases. *See* U.S. Const. art. III.

Authority to Enjoin the Layoffs

The next section of the Court's opinion considered "[t]he issue at the heart of this case[:]. . .whether the District Court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority." *Id.* This section of the opinion first interpreted the decree itself and then addressed the district court's "inherent authority" to modify the decree.

Interpretation of the Consent Decree

The Court stated that the court of appeals' interpretation of the language within the "four corners" of the consent decree did more than merely enforce its express terms. The Court found that the decree neither mentioned layoffs nor demotions nor made any suggestion that it intended to depart from the existing seniority system or from the city's arrangement with the union. If the parties had intended the district court to depart from the seniority rules with respect to layoffs, the Court stated, then it would be reasonable to believe that an express provision concerning the issue would have been included in the consent decree.

The Court found equally unconvincing the lower court's conclusion that the injunction was proper because it carried out the stated purposes of the 1980 decree, which were to remedy past hiring and promotion practices of the fire department. The Court noted that the remedy in the decree did not include the displacement of white employees with seniority over blacks. The Court also observed that it was reasonable to believe that any remedy in the consent decree would not exceed the bounds of relief appropriate under Title VII: "Title VII protects bona fide seniority systems, and it is inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy in a pattern or practice suit such as this." *Id.* at 2586. The Court reasoned that absent an express provision in the decree mandating such a "remedy," the city had no intention to depart from its seniority system. The Court found that, because neither the union nor the nonminority employees were parties to the case when the decree was entered in 1980, it was "highly unlikely" the city would "bargain away nonminority rights under the then-existing seniority system." *Id.*

Authority to Modify a Consent Decree

The Court next considered judicial authority to modify the consent decree. The Court explained that, according to *Teamsters* v. *United States,*[6] section 703(h) of Title VII immunizes "bona fide" seniority systems; that is, it "permits the routine application of a seniority system absent proof of an intention to discriminate." *Id.* at 2587. Accordingly, the Court rejected the holding of the court of appeals that the district court had "inherent authority" to modify a consent decree when an economic crisis unexpectedly required layoffs undermining the affirmative action outlined in the decree, even if such modification conflicts with a bona fide seniority system. *Id.* at 2586–87.[7]

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[6] 431 U.S. 324 (1977).

[7] The Court noted that a district court's authority to modify a consent decree "is not wholly dependent on the decree. '[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce,' not from the parties' consent to the decree." *Id.* at 2587 n.9 (quoting an earlier Supreme Court case). In short, parties seeking a consent decree in a Title VII case cannot obtain court approval of such a decree if it exceeds the relief the court itself could grant.

> Thus, Title VII necessarily acted as a limit on the District Court's authority to modify the decree over the objections of the City, the issue cannot be resolved solely by reference to the terms of the decree and notions of equity. Since Title VII precludes a district court from displacing a non-minority employee with seniority under the contractually established seniority system absent either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination, the District Court was precluded from granting such relief over the City's objection in this case.

Id.

The Court addressed the "three alternative rationales" that the court of appeals had articulated for the "inherent authority" of the district court to modify the decree. First, the court of appeals had stated that the injunction was proper on the basis of "a 'settlement' theory, i.e., that the strong policy favoring voluntary settlement of Title VII actions permitted consent decrees that encroached on [bona fide] seniority systems." *Id.* at 2587. The Court found this theory was inapplicable because there was no "settlement" with respect to the disputed issue; the parties had not agreed as part of their settlement to depart in any way from the seniority system.

The Court next rejected the court of appeals' second theory, that if the allegations in the complaint had been proven, the district court could have entered an order overriding the seniority system and that, therefore, authority existed to override the bona fide seniority system in order to effectuate the purposes of the 1980 decree.

The Court disagreed with the premise of the argument. This approach, the Court said, "overstates the authority of the trial court to disregard a seniority system in fashioning a remedy after a plaintiff has successfully proved that an employer has followed a pattern or practice having a dicriminatory effect on black applicants or employees." *Id.* at 2588. The Court noted that "[i]f individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster." *Id.* Citing *Teamsters*, the Court explained that "mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him." *Id.*[8] In this case, however, "there was no finding that any of the blacks protected from layoff had been a victim of discrimination and no award of competitive seniority to any of them." *Id.* The Court concluded: "[I]t therefore seems. . .that in light of *Teamsters*, the Court of Appeals imposed on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed." *Id.*

The Court then reasoned that the conclusion in *Teamsters* "that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind §706(g) of Title VII, *which affects the remedies available in Title VII litigation.*" *Id.* at 2588–89 (emphasis added).[9]

The Court continued:

> That policy, which is to provide make-whole relief only to those who have been actual victims of illegal discrimination, was repeatedly expressed by the sponsors of the Act during the congressional debates. Opponents of the legislation that became Title VII charged that if the bill were enacted, employers could be ordered to hire and promote persons in order to achieve a racially-balanced work force even though those persons had not been victims of illegal discrimination. Responding to these charges, Senator Humphrey explained the limits on a court's remedial powers as follows:
>
> > "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted without relevant change as §706(g)]. . . Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require. . .firing. . .of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but is nonexistent." 110 Cong. Rec. 6549 (remarks of Sen. Humphrey).
>
> An interpretative memorandum of the bill entered into the Congressional Record by Senators Clark and Case likewise made clear that a court was not authorized to give preferential treatment to non-victims. "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of [Title VII]. This is stated expressly in the last sentence of section [706(g)]. . . ." *Id.*, at 7214.
>
> Similar assurances concerning the limits on a court's authority to award make-whole relief were provided by supporters of the bill throughout the legislative process. For

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[8] Indeed, the Court noted:

> Even when an individual shows that the discriminatory practice has had an impact on him, he is not automatically entitled to have a non-minority employee laid off to make room for him. He may have to wait until a vacancy occurs, and if there are non-minority employees on layoff, the Court must balance the equities in determining who is entitled to the job.

Id. at 2588 (citations omitted). The Court noted that "[l]ower courts have uniformly held that relief [even] for actual victims does not extend to bumping employees previously occupying jobs." *Id.* at 2588 n.11.

[9] Section 706(g) (*see* note 4) is that part of Title VII which provides a court with authority to remedy violations of Title VII, either by consent decree or by a judgment entered after trial. As such, it provides the basis for a court's authority to provide relief in hiring and promotions, as well as in other aspects of employment. The last sentence of section 706(g) has served as the basis for the argument that a court may provide relief only to actual victims of an employer's discrimination.

> example, following passage of the bill in the House, its Republican House sponsors published a memorandum describing the bill. Referring to the remedial powers given the courts by the bill, the memorandum stated: "Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. *But Title VII does not permit the ordering of racial quotas in business or unions. . . ."Id.*, at 6566 (emphasis added [by the Court]). In like manner, the principal Senate sponsors, in a bi-partisan news letter delivered during an attempted filibuster to each senator supporting the bill, explained that "[u]nder title VII, not even a Court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title." *Id.*, at 14465.

Id. at 2589–90 (footnotes omitted).

The Court also relied on the legislative history of the 1972 amendments to Title VII, as well as its rulings in *Teamsters* and *Franks* v. *Bowman Transportation Co.*,[10] in concluding that judicial relief under Title VII can be accorded only to actual victims of the employer's discrimination.

The Court then quickly rejected the court of appeals' third rationale, that the district court did "no more than that which the City unilaterally could have done by way of adopting an affirmative action program." *Id.* at 2590. Explicitly declining to decide whether "a public employer. . .could have taken this course without violating the law," the Court said that the city took no such course and actually objected to the modification. Accordingly, that issue was not before the Court. *Id.*[11]

The Court also rejected the argument that the consent decree was properly "modified pursuant to the district court's equity jurisdiction" under an earlier decision of the Court, *United States* v. *Swift & Co.*[12] The Court stated: "But *Swift* cannot be read as authorizing a court to impose a modification of a decree that runs counter to statutory policy, . . .here §§703(h) [the seniority provision] *and 706(g)* [providing the basis of a court's remedial authority] of Title VII." *Id.* at 2590 n.17 (emphasis added).

Justice O'Connor's Concurring Opinion

Justice O'Connor, who joined the majority's opinion, concurred "in the Court's treatment of these difficult issues," and wished to state her "understanding of what the Court holds today." *Id.* at 2591 (O'Connor, J., concurring).

She agreed with the Court that the case was not moot because a controversy continued that could not be resolved merely by vacating a preliminary injunction. As a result of the injunction, she wrote, some black firefighters had obtained added seniority and the increased job opportunities such higher seniority entails. If the city does not vigorously defend the preexisting seniority system, "it will have to cope with deterioration in employee morale, labor unrest, and reduced productivity." *Id.* Because these and other "collateral effects of a dispute remain and continue to affect the relationship of litigants, the case is not moot." *Id.* (footnote omitted).

Turning to the merits of the case, Justice O'Connor viewed the place of this case in the history of the parties' litigation as dictating the Court's result. Although the city was a party to both an agreement with the union and the consent decree, the respondents neither sought the union's participation in the negotiations of their decree with the city, nor included the seniority system as a subject of the negotiations, and waived all rights to seek further relief. When the layoffs occurred, the district court ruled that the seniority system had not been adopted or applied with discriminatory intent, holding instead that modification of the decree was appropriate because of the system's discriminatory effects. Justice O'Connor observed that, had the respondents presented a plausible case of discriminatory intent in the adoption or application of the seniority system, the Court would have been "hard pressed" to decide that the preliminary injunction was an abuse of discretion. *Id.* at 2592. But the lower courts rejected the claim that the seniority system reflected intentional discrimination. A showing that the seniority system had a disproportionate effect would have been insufficient to sustain the preliminary injunction because Title VII "affirmatively protects bona fide seniority systems, including those with discriminatory effects on minorities." *Id.*

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[10] 427 U.S. 947 (1976).

[11] This issue raises the constitutional question of whether, under the equal protection clause of the 14th amendment, a government employer may voluntarily prefer nonvictims of its discrimination at the expense of innocent third parties on the basis of race. That issue was present in Bratton v. City of Detroit, which the Court declined to hear earlier in 1984.

[12] 286 U.S. 106, 114–15 (1932).

Adopting the reasoning of the Court and Justice Stevens that the consent decree itself could not be fairly interpreted to support the injunction, Justice O'Connor then stated that a district court cannot:

> unilaterally modify a consent decree to adjust racial imbalances or to provide retroactive relief that abrogates legitimate expectations of other employees and applicants. . . .A court may not grant preferential treatment to any individual or group simply because the group to which they belong is adversely affected by a bona fide seniority system. Rather, a court may use its remedial powers, including its power to modify a consent decree, only to prevent future violations and to compensate identified victims of unlawful discrimination.

Id. at 2593 (citations omitted).[13]

Justice O'Connor found "persuasive the Court's reasons for holding Title VII relevant to analysis of the modification issue. . .and the Court's application of Title VII's provisions to the facts of the present controversy." *Id.* at 2593 n.2. Justice O'Connor explained that the respondents in 1980 could have gone to trial, established discrimination in the department's past hiring practices, identified the victims, and "possibly" obtained limited forms of retroactive seniority. Alternatively, in negotiating the decree, they could have sought the participation of the union, identified specific victims, and obtained limited retroactive relief. Because the respondents did none of these things and "waived their right to seek further relief," to allow them "to obtain relief properly reserved for only identified victims or to prove their victim status now would undermine the certainty of obligation that is condition precedent to employers' acceptance of, and unions' consent to, employment discrimination settlements." *Id.* at 2593. She found that modifications requiring maintenance of racial balance not only would discourage valid settlements of employment discrimination cases, but also would operate to impede them. "Thus, when the Court states that this preferential relief could not have been awarded even had *this case* gone to trial,. . .it is holding respondents to the bargain they struck during the consent decree negotiations in 1980 and thereby furthering the statutory policy of voluntary settlement." *Id.* at 2594 (emphasis in original). Justice O'Connor's conclusion was "[t]hat the District Court had no authority to order the [Fire] Department to maintain its current racial balance or to provide preferential treatment to blacks." *Id.*

Justice Stevens' Concurring Opinion

Justice Stevens found that the case was not moot because the district court's preliminary injunction remained reviewable due to its continuing effect on the city's personnel policies. Justice Stevens concluded that the likelihood that the city would have to have another layoff was not so remote as to give it no stake in the outcome of the litigation. *Id.* at 2594. (Stevens, J., concurring in the judgment).

With respect to the Court's discussion of Title VII, Justice Stevens stated that it was "wholly advisory." In his judgment, the case involved no Title VII issues, only the administration of a consent decree. If the consent decree justified the district court's preliminary injunction, he wrote, the injunction should have been upheld "irrespective of whether Title VII would authorize a similar injunction." *Id.*[14]

Justice Stevens concluded that the injunction was invalid as a matter of construction of the consent decree: "There is simply nothing in the record to justify the conclusion that the injunction was based on a reasoned construction of the consent decree." *Id.* at 2595. He also rejected the argument that "changed circumstances" justified the injunction as a modification of the decree. Circumstances had not changed; when the decree was entered, "it was apparent that any future seniority-based layoffs would have an adverse effect on blacks." *Id.*

Justice Blackmun's Dissenting Opinion

Justice Blackmun, joined by Justices Brennan and Marshall, dissented, arguing that the case was moot, that the Court applied an incorrect standard in reviewing the case, and that both the consent decree and Title VII permit the relief ordered by the district court.

Mootness

Justice Blackmun stated that because all laid-off workers had been rehired, the case, although "live" at its start, had become moot, rendering the Court's opinion "wholly advisory." *Id.* at 2596 (Blackmun, J., dissenting). When a court declares a case moot, it vacates the judgment and reinstates the legal relationship of the parties existing prior to the beginning of the lawsuit. Such an action here, Justice Blackmun asserted, would allow the parties to start fresh should future layoffs become necessary.

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[13] Indeed, "[e]ven when its remedial powers are properly invoked, a district court may award preferential treatment only after carefully balancing the competing interests of discriminatees, innocent employees, and the employer. In short, no matter how significant the change in circumstance, a district court cannot unilaterally modify a consent decree to adjust racial balances in the way the District Court did here." *Id.* at 2593 (citations omitted).

[14] Justice Stevens shared Justice Blackmun's "doubts" that in Title VII litigation "a consent decree cannot authorize anything that would not constitute permissible relief under Title VII." Sections 703(h) and 706(g), he stated, "do not place any limitations on what the parties can agree to in a consent decree." *Id.* at 2594–95 n.3. The majority opinion explicitly rejected this view. *Id.* at 2587 n.9.

Justice Blackmun rejected the Court's statement that "even if the preliminary injunction applies only to the 1981 layoffs, the 'rulings' that formed the 'predicate' for the preliminary injunction 'remain undisturbed.'" *Id.* at 2597. Justice Blackmun stated that vacating the judgment "would also vacate whatever 'rulings' formed the 'predicate' for that judgment," since there is no "'ruling' that has a life independent of the judgment." *Id.* Justice Blackmun found "equally remarkable" the Court's "notion" that the case is not moot because the respondents still defend the district court's ruling. A party need not concede that his case lacks merit in order to argue mootness, he pointed out. With respect to the Court's conclusion that the lost wages and seniority of the white employees keep the controversy justiciable, Justice Blackmun argued that the city's ability to make these employees whole is unaffected by the preliminary injunction and that even "the Court concedes that there is doubt whether, in fact, the union possesses any enforceable contractual rights" against the city. *Id.* at 2599.[17]

Proper Standard of Review

Justice Blackmun asserted that the Court also ignored the proper standard of review—whether the district court abused its discretion—by incorrectly treating the preliminary injunction as if it were a permanent injunction on the merits of the case.[18] "After taking jurisdiction over a controversy that no longer exist[ed], the Court review[ed] a decision that was never made." *Id.* at 2600.

Statement of the Issue

Moreover, the Court misstated the issue in the case when it focused on "the District Court's power to 'ente[r] an injunction requiring white employees to be laid off.'" *Id.* at 2602. The preliminary injunction neither required the city to lay off any employees nor abrogated the contractual rights of any white employees. Properly stated, the dissent contended, the issue is the district court's authority "to enjoin a layoff of more than a certain number of blacks." *Id.*

District Court's Authority

Interpretation of the Consent Decree

Construing the terms of the consent decree essentially as a contract, Justice Blackmun indicated that the district court had authority to enforce the consent decree pursuant to a paragraph in the decree providing that "[t]he Court retains jurisdiction of this action for such further orders as may be necesssary or appropriate to effectuate the purposes of this decree." The decree also contained a provision requiring "reasonable, good faith efforts" to meet the decree's hiring and promotion goals. *Id.* at 2603. By treating the district court's preliminary injunction as a permanent one, however, Justice Blackmun argued, the Court first deprived the respondents of the opportunity to build a factual record demonstrating that the proposed layoffs violated the decree and then faulted them for having failed to do so. *Id.* If the trial court had determined that the layoffs would "frustrate" the purposes of the consent decree, "then the decree empowered the District Court to enter an appropriate order." *Id.* at 2604.

Authority to Modify a Consent Decree

Disagreeing with the Court's position on the inherent power of the district court to modify the decree, the dissenters, citing an earlier Court decision, noted that a Federal trial court, as a court of equity, has inherent power "to modify an injunction in adaptation to changed conditions. . . ." *Id.* The dissent charged the Court with overlooking an important distinction between "individual relief" and "race-conscious class relief" under section 706(g) of Title VII. *Id.* at 2605. Justice Blackmun, citing decisions by virtually every Federal appellate court, stated that in addition to "make whole" relief, which is available only if the plaintiff can show individual discrimination, the courts of appeals have unanimously held that race-conscious affirmative remedies are also appropriate under section 706(g). *Id.* at 2606 and n.10. The dissent stated that "[t]he purpose of such [race-conscious] relief is not to make whole any particular individual, but rather to remedy the present class-wide effects of past discrimination or to prevent similar discrimination in the future." *Id.* at 2606. Further, "[b]ecause these cases arise out of a consent decree,. . .it is. . .impossible for the Court to know the extent and nature of any past discrimination by the city." *Id.*

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[17] Justice Blackmun also noted that the Court's decision in this case would not provide the affected employees with either backpay or seniority because both the city and the union were petitioners, not adversaries. *Id.* at 2598.

[18] Preliminary injunctions are issued before a full factual record has been completed and usually in considerable haste. Consequently, reviewing courts, Justice Blackmun argued, should not equate the rulings in these circumstances with a ruling on the merits after a trial.

According to Justice Blackmun, the Court's reliance on *Teamsters* was erroneous. Justice Blackmun explained that only individual claims for relief were before the Court in *Teamsters* because earlier in the litigation the parties had negotiated a consent decree with race-conscious provisions settling all classwide claims; the layoffs in *Stotts*, however, exclusively concerned classwide, race-conscious relief. *Id.* at 2608.[17] *Teamsters*, he said, did not address "the nature of appropriate affirmative class relief that would have been available had such relief not been provided in the consent decree between the parties." *Id.*

Although he acknowledged that "many in Congress [in 1964] opposed. . .race-conscious remedies," Justice Blackmun contended that:

> there is [legislative] authority that supports a narrower interpretation of §706(g). Under that interpretation, the last sentence of §706(g) addresses only the situation in which a plaintiff demonstrates that an employer has engaged in unlawful discrimination, but the employer can show that a particular individual would not have received the job, promotion or reinstatment even in the absence of discrimination because there was also a lawful justification for the action.

Id. Moreover, in 1972 Congress specifically added to section 706(g) a phrase permitting "any other equitable relief as the court deems appropriate," and the Senate specifically rejected an amendment intended to prohibit employment goals and quotas.[18]

Noting that Justice White and three other Justices had joined in an opinion in *University of California Regents* v. *Bakke*,[19] which stated that Title VII does not bar the remedial use of race, and that the unanimous view of the courts of appeals was that Title VII does not prohibit race-conscious remedies, Justice Blackmun stated his view of the scope of the Court's decision:

> Because the Court's opinion does not even acknowledge this consensus, it seems clear that the Court's conclusion that the District Court "ignored the policy" of §706(g) is a statement that the race-conscious relief ordered in these cases was broader than necessary, not that race-conscious relief is never appropriate under Title VII.

Id. at 2610.

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[17] Justice Blackmun added that "[a]ny suggestion that a consent decree can provide relief only if a defendant concedes liability would drastically reduce. . .the incentives for entering into consent decrees," thus discouraging the kind of voluntary settlement of Title VII cases the Court had earlier said Congress wished to achieve. *Id.* at 2607.

[18] The majority opinion addressed the argument that the 1972 amendments to Title VII permit race-conscious remedies and came to the opposite conclusion. *Id.* at 2590 n.15.

[19] 438 U.S. 265, 353 n.28 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

Stotts Opinion

FIREFIGHTERS LOCAL UNION NO. 1784, Petitioner,

v.

Carl W. STOTTS et al.

MEMPHIS FIRE DEPARTMENT et al., Petitioners,

v.

Carl W. STOTTS, etc., et al.

No. 82-206.

Argued Dec. 6, 1983.
Decided June 12, 1984 *

After consent decrees had been entered in equal employment opportunity case against city, worker moved to restrain city from implementing layoff proposal in manner affecting minority firemen. The United States District Court for the Western District of Tennessee modified the decrees and enjoined proposed layoffs and demotions of minority firemen. The Court of Appeals, Sixth Circuit, affirmed, 679 F.2d 541. City and union filed petitions for certiorari, which were granted, and the

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* Together with No. 82-229, *Memphis Fire Department et al. v. Stotts et al.*, also on certiorari to the same court.

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cases were consolidated for oral argument. The Supreme Court, Justice White, held that: (1) the cases were not moot; (2) the District Court exceeded its powers in entering an injunction requiring white employees to be laid off when an otherwise applicable seniority system would have called for the layoff of black employees with less seniority; and (3) the District Court's order could not be justified as enforcing terms of the agreed-upon consent decree, as carrying out the purposes of the decree, as being within inherent authority to modify the decree, as being consistent with strong policy favoring voluntary settlement of Title VII actions, as being within the court's authority to award make-whole relief or as a valid Title VII remedial order.

Judgment of the Court of Appeals reversed.

Justice O'Connor filed concurring opinion.

Justice Stevens filed opinion concurring on the judgment.

Justice Blackmun dissented and filed opinion in which Justice Brennan and Justice Marshall joined.

1. Federal Courts ⇨460

Where it appeared from its terms that injunction was still in force and that, unless set aside, compliance would be required in the future, and where, in any event, mandated modification of consent decree continued its impact on parties in that, unless overturned, court rulings would remain in effect and would require city to obey modified consent decree and to disregard its seniority agreement in making future layoffs of employees, case was not moot as against contention that all white employees laid off as result of injunction had been restored to duty only one month after layoff and those who had been demoted had since been offered back their old positions.

2. Federal Courts ⇨460

Where unless judgment of Court of Appeals was reversed, laid off or "bumped down" employees would have back pay claims, judgment would have continuing effect on city's management of its fire department, and case was not moot despite contention that all white employees laid off as result of injunction had been restored to duty and that those demoted had been offered back their old positions.

3. Federal Courts ⇨460

As long as parties have concrete interest in outcome of litigation, case is not moot, notwithstanding size of dispute, and amount of money and seniority at stake did not determine mootness though not much money or seniority were involved.

4. Federal Courts ⇨460

Respondents could not invoke jurisdiction of federal court to obtain favorable modification of consent decree and then insulate that ruling from appellate review by claiming that they were no longer interested in the matter, particularly when modification continued to have adverse effects on the other parties to the action.

5. Federal Civil Procedure ⇨2397

Scope of consent decree must be discerned within its four corners, not by reference to what might satisfy purposes of one of the parties to it or by what might have been written had party established his factual claims and legal theories in litigation.

6. Federal Civil Procedure ⇨2397

Express terms of consent decree could not be construed as contemplating that injunction would be entered to preclude city, as employer of firemen, from following seniority system adopted by the city and union.

7. Civil Rights ⇨46(7)
Federal Civil Procedure ⇨2397

It was reasonable to believe that "remedy" which it was purpose of consent decree to provide would not exceed bounds of remedies appropriate under Title VII, at least in absence of some express provision to that effect, and city no doubt considered its seniority system to be valid and had no intention of departing from it when it agreed to consent decree, and thus injunction precluding city as employer from following seniority system adopted by city and union was not justifiable as merely enforcing agreement of the parties as reflected in prior consent decree. Civil Rights Act of 1964, §§ 701 et seq., 703(h), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e–2(h).

8. Federal Civil Procedure ⇨2397

District court's authority to impose modification of decree was not wholly dependent on decree, and Title VII necessarily acted as limit on the district court's authority to modify decree over objections of employer, issue being not subject to resolution solely by reference to terms of consent decree and notions of equity. Civil Rights Act of 1964, §§ 701 et seq., 703(h), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e–2(h).

9. Civil Rights ⇨9.12

Title VII provision that it is not unlawful employment practice to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to bona fide seniority system provided that such differences are not result of intention to discriminate because of race permits routine application of seniority system, absent proof of intention to discriminate. Civil Rights Act of 1964, § 703(h), as amended, 42 U.S.C.A. § 2000e–2(h).

10. Federal Civil Procedure ⇨2397

"Settlement theory" as support for injunction assertedly based upon consent decree or modification thereof had no application where there was no "settlement" with respect to disputed issue.

11. Civil Rights ⇨46(7)

If individual members of plaintiff class demonstrate that they have been actual victims of discriminatory employment practice, they may be awarded competitive seniority, but mere membership in disadvantaged class is insufficient and each individual must prove that the discriminatory practice had impact on him, and even if he shows such impact, he is not automatically entitled to have nonminority employee laid off to make room for him, but he may have to wait until vacancy occurs, and if there are nonminority employees on layoff, court must balance equities in determining who is entitled to the job. Civil Rights Act of 1964, §§ 701 et seq., 703(h), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e–2(h).

12. Civil Rights ⇨46(7)

Judicial precedent that court can award competitive seniority only when beneficiary of award has actually been victim of illegal discrimination is consistent with policy behind Title VII provision affecting remedies available in Title VII litigation, which policy is to provide make-whole relief only to those who have been actual victims of illegal discrimination. Civil Rights Act of 1964, § 706(g), as amended, 42 U.S.C.A. § 2000e–5(g).

13. Civil Rights ⇨46(2)

Court in Title VII case is not authorized to give preferential treatment to nonvictims. Civil Rights Act of 1964, § 706(g), as amended, 42 U.S.C.A. § 2000e–5(g).

14. Civil Rights ⇨46(2)

The 1972 amendments of Title VII evidence emphatic confirmation that federal courts are empowered to fashion such relief as particular circumstances of case may require to effect restitution, making whole insofar as possible "the victims of racial discrimination." Civil Rights Act of 1964, §§ 703(h), 706(g), as amended, 42 U.S.C.A. §§ 2000e–2(h), 2000e–5(g); 42 U.S.C.A. §§ 1981, 1983.

15. Civil Rights ⇨46(7)

Injunctive order precluding city as employer from following seniority policy mandated by seniority system adopted by city and union was in conflict with policy behind Title VII provision for relief to be ordered by the court. Civil Rights Act of 1964, § 706(g), as amended, 42 U.S.C.A. § 2000e–5(g); 42 U.S.C.A. §§ 1981, 1983.

16. Civil Rights ⟹13.4(6)

Under statute providing for the equal rights of all citizens and 1871 civil rights statute, relief is authorized only when there is proof or admission of intentional discrimination. 42 U.S.C.A. §§ 1981, 1983.

17. Civil Rights ⟹46(3)

That city as employer could have done, by way of adopting affirmative action program, what district court ordered city to do was insufficient to justify the district court's order. Civil Rights Act of 1964, §§ 703(h), 706(g), as amended, 42 U.S.C.A. §§ 2000e–2(h), 2000e–5(g).

18. Federal Civil Procedure ⟹2643

Court is not authorized pursuant to its equity jurisdiction to impose modification of decree counter to statutory policy. Civil Rights Act of 1964, §§ 703(h), 706(g), as amended, 42 U.S.C.A. §§ 2000e–2(h), 2000e–5(g).

Syllabus[**]

Respondent Stotts, a black member of petitioner Memphis, Tenn., Fire Department, filed a class action in Federal District Court charging that the Department and certain city officials were engaged in a pattern or practice of making hiring and promotion decisions on the basis of race in violation of, *inter alia*, Title VII of the Civil Rights Act of 1964. This action was consolidated with an action filed by respondent Jones, also a black member of the Department, who claimed that he had been denied a promotion because of his race. Thereafter, a consent decree was entered with the stated purpose of remedying the Department's hiring and promotion practices with respect to blacks. Subsequently, when the city announced that projected budget deficits required a reduction of city employees, the District Court entered an order preliminarily enjoining the Department from following its seniority system in determining who would be laid off as a result of the budgetary shortfall, since the proposed layoffs would have a racially discriminatory effect and the seniority system was not a bona fide one. A modified layoff plan, aimed at protecting black employees so as to comply with the court's order, was then presented and approved, and layoffs pursuant to this plan were carried out. This resulted in white employees with more seniority than black employees being laid off when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority. The Court of Appeals affirmed, holding that although the District Court was wrong in holding that the seniority system was not bona fide, it had acted properly in modifying the consent decree.

Held:

1. These cases are not rendered moot by the facts that the preliminary injunction purportedly applied only to 1981 layoffs, that all white employees laid off as a result of the injunction were restored to duty only one month after their layoff, and that others who were demoted have been offered back their old positions. First, the injunction is still in force and unless set aside must be complied with in connection with any future layoffs. Second, even if the injunction applied only to the 1981 layoffs, the predicate for it was the ruling that the consent decree must be modified to provide that the layoffs were not to reduce the percentage of black employees, and the lower courts' rulings that the seniority system must be disregarded for the purpose of achieving the mandated result remain undisturbed. Accordingly, the inquiry is not merely whether the injunction is still in effect, but whether the mandated modification of the consent decree continues to have an impact on the parties such that the cases remain alive. Respondents have failed to convince this Court that the modification and the *pro tanto* invalidation of the seniority system are of no real concern to the city because it will never again con-

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[**] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

template layoffs that if carried out in accordance with the seniority system would violate the modified decree. Finally, the judgment below will have a continuing effect on management of the Fire Department with respect to making whole the white employees who were laid off and thereby lost a month's pay and seniority, or who were demoted and thereby may have backpay claims. Unless that judgment is reversed, the layoffs and demotions were in accordance with the law. The fact that not much money and seniority are involved does not determine mootness. Pp. 2583–2585.

2. The District Court's preliminary injunction cannot be justified either as a effort to enforce the consent decree or as a valid modification thereof. Pp. 2585–2590.

(a) The injunction does not merely enforce the agreement of the parties as reflected in the consent decree. The scope of a consent decree must be discerned within its four corners. Here, the consent decree makes no mention of layoffs or demotions nor is there any suggestion of an intention to depart from the existing seniority system or from the Department's arrangement with the union. It therefore cannot be said that the decree's express terms contemplated that such an injunction would be entered. Nor is the injunction proper as carrying out the stated purpose of the decree. The remedy outlined in the decree did not include the displacement of white employees with seniority over blacks and cannot reasonably be construed to exceed the bounds of remedies that are appropriate under Title VII. Title VII protects bona fide seniority systems, and it is inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy in a pattern-or-practice suit such as this. Moreover, since neither the union nor the white employees were parties to the suit when the consent decree was entered, the entry of such decree cannot be said to indicate any agreement by them to any of its terms. Pp. 2586–2587.

(b) The theory that the strong policy favoring voluntary settlement of Title VII actions permits consent decrees that encroach on seniority systems does not justify the preliminary injunction as a legitimate modification of the consent decree. That theory has no application when there is no "settlement" with respect to the disputed issue, such as here where the consent decree neither awarded competitive seniority to the minority employees nor purported to depart from the existing seniority system. Nor can the injunction be so justified on the basis that if the allegations in the complaint had been proved, the District Court could have entered an order overriding the seniority provisions. This approach overstates a trial court's authority to disregard a seniority system in fashioning a remedy after a plaintiff has proved that an employer has followed a pattern or practice having a discriminatory effect on black employees. Here, there was no finding that any of the blacks protected from layoff had been a victim of discrimination nor any award of competitive seniority to any of them. The Court of Appeals' holding that the District Court's order modifying the consent decree was permissible as a valid Title VII remedial order ignores not only the ruling in *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396, that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination, but also the policy behind § 706(g) of Title VII of providing make-whole relief only to such victims. And there is no merit to the argument that the District Court ordered no more than that which the city could have done by way of adopting an affirmative-action program, since the city took no such action and the modification of the decree was imposed over its objection. Pp. 2587–2590.

679 F.2d 541, reversed.

Allen S. Blair, Memphis, Tenn., for petitioners.

Sol. Gen. Rex E. Lee, Washington, D.C., for the U.S. as amicus curiae, by special leave of Court.

Richard B. Fields, Memphis, Tenn., for respondents.

Justice WHITE delivered the opinion of the Court.

Petitioners challenge the Court of Appeals' approval of an order enjoining the City of Memphis from following its seniority system in determining who must be laid off as a result of a budgetary shortfall. Respondents contend that the injunction was necessary to effectuate the terms of a Title VII consent decree in which the City agreed to undertake certain obligations in order to remedy past hiring and promotional practices. Because we conclude that the order cannot be justified, either as an effort to enforce the consent decree or as a valid modification, we reverse.

I

In 1977 respondent Carl Stotts, a black holding the position of fire-fighting captain in the Memphis, Tennessee, Fire Department, filed a class action complaint in the United States District Court for the Western District of Tennessee. The complaint charged that the Memphis Fire Department and other city officials were engaged in a pattern or practice of making hiring and promotion decisions on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as well as 42 U.S.C. §§ 1981 and 1983. The District Court certified the case as a class action and consolidated it with an individual action subsequently filed by respondent Fred Jones, a black fire-fighting private in the Department, who claimed that he had been denied a promotion because of his race. Discovery proceeded, settlement negotiations ensued, and in due course, a consent decree was approved and entered by the District Court on April 25, 1980.

The stated purpose of the decree was to remedy the hiring and promotion practices "of the Department with respect to blacks." 679 F.2d 541, 575–576 (CA6 1982) (Appendix). Accordingly, the City agreed to promote 13 named individuals and to provide backpay to 81 employees of the Fire Department. It also adopted the long-term goal of increasing the proportion of minority representation in each job classification in the Fire Department to approximately the proportion of blacks in the labor force in Shelby County, Tennessee. However, the City did not, by agreeing to the decree, admit "any violations of law, rule or regulation with respect to the allegations" in the complaint. *Id.*, at 574. The plaintiffs waived any further relief save to enforce the decree, *ibid.*, and the District Court retained jurisdiction "for such further orders as may be necessary or appropriate to effectuate the purposes of this decree." *Id.*, at 578.

The long-term hiring goal outlined in the decree paralleled the provisions of a 1974 consent decree, which settled a case brought against the City by the United States and which applied citywide. Like the 1974 decree, the 1980 decree also established an interim hiring goal of filling on an annual basis 50 percent of the job vacancies in the Department with qualified black applicants. The 1980 decree contained an additional goal with respect to promotions: the Department was to attempt to ensure that 20 percent of the promotions in each job classification be given to blacks. Neither decree contained provisions for layoffs or reductions in rank, and neither awarded any competitive seniority. The 1974 decree did require that for purposes of promotion, transfer, and assignment, seniority was to be computed "as the total seniority of that person with the City." *Id.*, at 572.

In early May, 1981, the City announced that projected budget deficits required a reduction of non-essential personnel throughout the City Government. Layoffs were to be based on the "last hired, first fired" rule under which city-wide seniority, determined by each employee's length of continuous service from the latest date of permanent employment, was the basis for deciding who would be laid off. If a senior employee's position were abolished or eliminated, the employee could "bump down" to a lower ranking position rather than be laid off. As the Court of Appeals later noted, this layoff policy was adopted pursuant to the seniority system "mentioned in the 1974 decree and . . . incorporated in the City's memorandum with the Union." 679 F.2d, at 549.

On May 4, at respondents' request, the District Court entered a temporary restraining order forbidding the layoff of any black employee. The Union, which previously had not been a party to either of these cases, was permitted to intervene. At the preliminary injunction hearing, it appeared that 55 then-filled positions in the Department were to be eliminated and that 39 of these positions were filled with employees having "bumping" rights. It was estimated that 40 least-senior employees in the fire-fighting bureau of the Department[1] would be laid off and that of these 25 were white and 15 black. It also appeared that 56 percent of the employees hired in the Department since 1974 had been black and that the percentage of black employees had increased from approximately 3 or 4 percent in 1974 to 11½ percent in 1980.

On May 18, the District Court entered an order granting an injunction. The Court found that the consent decree "did not contemplate the method to be used for reduction in rank or lay-off," and that the layoff policy was in accordance with the City's seniority system and was not adopted with any intent to discriminate. Nonetheless, concluding that the proposed layoffs would have a racially discriminatory effect and that the seniority system was not a bona fide one, the District Court ordered that the City "not apply the seniority policy insofar as it will decrease the percentage of black lieutenants, drivers, inspectors and privates that are presently employed . . . ." On June 23, the District Court broadened its order to include three additional classifications. A modified layoff plan, aimed at protecting black employees in the seven classifications so as to comply with the court's order, was presented and approved. Layoffs pursuant to the modified plan were then carried out. In certain instances, to comply with the injunction, non-minority employees with more seniority than minority employees were laid off or demoted in rank.[2]

On appeal, the Court of Appeals for the Sixth Circuit affirmed despite its conclusion that the District Court was wrong in holding that the City's seniority system was not bona fide. 679 F.2d, at 551, n. 6. Characterizing the principal issue as "whether the district court erred in modifying the 1980 Decree to prevent minority employment from being affected disproportionately by unanticipated layoffs," *id.*, at 551, the Court of Appeals concluded that the District Court had acted properly. After determining that the decree was properly approved in the first instance, the court held that the modification was permissible under general contract principles because the City "contracted" to provide "a substantial increase in the number of minorities in supervisory positions" and the layoffs would breach that contract. *Id.*, at 561. Alternatively, the court held that the District Court was authorized to modify the decree because new and unforeseen circumstances had created a hardship for one of the parties to the decree. *Id.*, at 562–563. Finally, articulating three alternative rationales, the court rejected petitioners' argument that the modification was improper because it conflicted with the City's seniority system, which was immunized from Title VII attack under § 703(h) of that Act, 42 U.S.C. § 2000e–2(h).

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[1] The Memphis Fire Department is divided into several bureaus, including fire-fighting, alarm office, administration, apparatus, maintenance, and fire prevention. Of the positions covered by the original injunction, all but one were in the fire-fighting bureau.

[2] The City ultimately laid off 24 privates, three of whom were black. Had the seniority system been followed, six blacks would have been among the 24 privates laid off. Thus, three white employees were laid off as a direct result of the District Court's order. The number of whites demoted as a result of the order is not clear from the record before us.

The City and the Union filed separate petitions for certiorari. The two petitions were granted, — U.S. —, 103 S.Ct. 2451, 77 L.Ed.2d 1331 (1983), and the cases were consolidated for oral argument.

II

[1] We deal first with the claim that these cases are moot. Respondents submit that the injunction entered in this case was a preliminary injunction dealing only with the 1981 layoffs, that all white employees laid off as a result of the injunction were restored to duty only one month after their layoff, and that those who were demoted have now been offered back their old positions. Assertedly, the injunction no longer has force or effect, and the cases are therefore moot. For several reasons, we find the submission untenable.

First, the injunction on its face ordered "that the defendants not apply the seniority policy proposed insofar as it will decrease the percentage of black" employees in specified classifications in the Department. The seniority policy was the policy adopted by the City and contained in the collective bargaining contract with the Union. The injunction was affirmed by the Court of Appeals and has never been vacated. It would appear from its terms that the injunction is still in force and that unless set aside must be complied with in connection with any future layoffs.

Second, even if the injunction itself applied only to the 1981 layoffs, the predicate for the so-called preliminary injunction was the ruling that the consent decree must be construed to mean and, in any event, must be modified to provide that layoffs were not to reduce the percentage of blacks employed in the fire department. Furthermore, both the District Court and the Court of Appeals, for different reasons, held that the seniority provisions of the City's collective bargaining contract must be disregarded for the purpose of achieving the mandated result. These rulings remain undisturbed, and we see no indication that respondents concede in urging mootness that these rulings were in error and should be reversed. To the contrary, they continue to defend them. Unless overturned, these rulings would require the City to obey the modified consent decree and to disregard its seniority agreement in making future layoffs.

Accordingly, the inquiry is not merely whether the injunction is still in effect, but whether the mandated modification of the consent decree continues to have an impact on the parties such that the case remains alive.[3] We are quite unconvinced—and it is the respondents' burden to convince us, *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979)—that the modification of the decree and the *pro tanto* invalidation of the seniority system is of no real concern to the City because it will never again contemplate layoffs that if carried out in accordance with the seniority system would violate the modified decree.[4] For this reason alone, the case is not moot.

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[3] The Court of Appeals, recognizing that the District Court had done more than temporarily preclude the City from applying its seniority system, stated that the "principal issue" before it was "whether the district court erred in modifying the 1980 Decree to prevent minority employment from being affected disproportionately by unanticipated layoffs." 679 F.2d, at 551.

[4] Of course if layoffs become necessary, both the City and respondents will be affected by the modified decree, the City because it will be unable to apply its seniority system, respondents because they will be given greater protection than they would otherwise receive under that system. Moreover, the City will be immediately affected by the modification even though no layoff is currently pending. If the lower courts' ruling is left intact, the City will no longer be able to promise current or future employees that layoffs will be conducted solely on the basis of seniority. Against its will, the City has been deprived of the power to offer its employees one of the benefits that make employment with the City attractive to many workers. Seniority has traditionally been, and con

[2] Third, the judgment below will have a continuing effect on the City's management of the Department in still another way. Although the City has restored or offered to restore to their former positions all white employees who were laid off or demoted, those employees have not been made whole: those who were laid off have lost a month's pay, as well as seniority that has not been restored; and those employees who "bumped down" and accepted lesser positions will also have back-pay claims if their demotions were unjustified. Unless the judgment of the Court of Appeals is reversed, however, the layoffs and demotions were in accordance with the law, and it would be quite unreasonable to expect the City to pay out money to which the employees had no legal right. Nor would it feel free to respond to the seniority claims of the three white employees who, as the City points out, lost competitive seniority in relation to all other individuals who were not laid off, including those minority employees who would have been laid off but for the injunction.[5] On the other hand, if the Court of Appeals' judgment is reversed, the City would be free to take a wholly different position with respect to backpay and seniority.

[3] Undoubtedly, not much money and seniority are involved, but the amount of money and seniority at stake does not determine mootness. As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute. *Powell v. McCormack*, 395 U.S. 486, 496–498, 89 S.Ct. 1944, 1950–1951, 23 L.Ed.2d 491 (1969). Moreover, a month's pay is not a negligible item for those affected by the injunction, and the loss of a month's competitive seniority may later determine who gets a promotion, who is entitled to bid for transfers or who is first laid off if there is another reduction in force. These are matters of substance, it seems to us, and enough so to foreclose any claim of mootness. Cf. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 756, 96 S.Ct. 1251, 1260, 47 L.Ed.2d 444 (1976); *Powell v. McCormack*, *supra*, 395 U.S., at 496–498, 89 S.Ct., at 1950–1951; *Bond v. Floyd*, 385 U.S. 116, 128, n. 4, 87 S.Ct. 339, 345, n. 4, 17 L.Ed.2d 235 (1966).

[4] In short, respondents successfully attacked the City's initial layoff plan and secured a judgment modifying the consent decree, ordering the City to disregard its seniority policy, and enjoining any layoffs that would reduce the percentage of blacks in the Department. Respondents continue to defend those rulings, which, as we have said, may determine the City's disposition of back pay claims and claims for restoration of competitive seniority that will affect

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tinues to be, a matter of great concern to American workers. "[M]ore than any other provision of the collective [bargaining] agreement . . . seniority affects the economic security of the individual employee covered by its terms." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766, 96 S.Ct. 1251, 1265, 47 L.Ed.2d 444 (1976) (quoting Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L.Rev. 1532, 1535 (1962)). It is not idle speculation to suppose that the City will be required to offer greater monetary compensation or fringe benefits in order to attract and retain the same caliber and number of workers as it could without offering such benefits were it completely free to implement its seniority system. The extent to which the City's employment efforts will be harmed by the loss of this "bargaining chip" may be difficult to measure, but in view of the importance that American workers have traditionally placed on such benefits, the harm cannot be said to be insignificant. Certainly, an employer's bargaining position is as substantially affected by a decree precluding it from offering its employees the benefits of a seniority system as it is by a state statute that provides economic benefits to striking employees. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122–125, 94 S.Ct. 1694, 1698–1699, 40 L.Ed.2d 1 (1974).

[5] Since the District Court's order precludes the City from reducing the percentage of black employees holding particular jobs in the event of a layoff or reduction in rank and since competitive seniority is the basis for determining who will be laid off or bumped down, there is some question whether, in light of the judgment below, the City could legally restore to the laid-off employees the competitive seniority they had before the layoffs without violating the order.

respondents themselves. It is thus unrealistic to claim that there is no longer a dispute between the City and respondents with respect to the scope of the consent decree. Respondents cannot invoke the jurisdiction of a federal court to obtain a favorable modification of a consent decree and then insulate that ruling from appellate review by claiming that they are no longer interested in the matter, particularly when the modification continues to have adverse effects on the other parties to the action.[6]

III

The issue at the heart of this case is whether the District Court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system[7] would have called for the layoff of black employees with less seniority.[8] We are convinced that the Court of Appeals erred in resolving this issue and in affirming the District Court.

A

[5, 6] The Court of Appeals first held that the injunction did no more than enforce the terms of the agreed-upon consent decree. This specific-performance approach rests on the notion that because the City was under a general obligation to use its best efforts to increase the proportion of blacks on the force, it breached the decree by attempting to effectuate a layoff policy reducing the percentage of black employees in the Department even though such a policy was mandated by the seniority system adopted by the City and the Union. A variation of this argument is that since the decree permitted the District Court to enter any later orders that "may be necessary or appropriate to effectuate the purposes of this decree," 679 F.2d, at 578 (Appendix), the City had agreed in advance to an injunction against layoffs that would reduce the proportion of black employees. We are convinced, however, that both of these are improvident constructions of the consent decree.

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[6] The present case is distinguishable from *University of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981), on which the dissent relies in that the defendant in *Camenisch* was not a party to a decree that had been modified by the lower court. When the injunction in that case expired, the defendant was in all respects restored to its pre-injunction status. Here, the City is faced with a modified consent decree that prevents it from applying its seniority system in the manner that it chooses.

[7] Respondents contend that the memorandum of understanding between the Union and the City is unenforceable under state law, citing *Fulenwider v. Firefighters Association Local Union 1784*, 649 S.W.2d 268 (Tenn.1982). However, the validity of that memorandum under state law is unimportant for purposes of the issues presented in this case. First, the Court of Appeals assumed that the memorandum was valid in reaching its decision. 679 F.2d, at 564, n. 20. Since we are reviewing that decision, we are free to assume the same. Moreover, even if the memorandum is unenforceable, the City's seniority system is still in place. The City unilaterally adopted the seniority system citywide in 1973. That policy was incorporated into the memorandum of understanding with the Firefighters Union in 1975, but its citywide effect, including its application to the Fire Department, continues irrespective of the status of the memorandum.

[8] The dissent's contention that the only issue before us is whether the District Court so misapplied the standards for issuing a preliminary injunction that it abused its discretion, *post*, at 2600, overlooks what the District Court did in this case. The District Court did not purport to apply the standards for determining whether to issue a preliminary injunction. It did not even mention them. Instead, having found that the consent decree did "not contemplate what method would be used for a reduction in rank or layoff," the court considered "whether or not . . . it should exercise its authority to modify the consent decree . . . ." Petition for Certiorari, at A73. As noted above, the Court of Appeals correctly recognized that more was at stake than a mere preliminary injunction, stating that the "principal issue" was "whether the district court erred in modifying the 1980 Decree to prevent minority employment from being affected disproportionately by unanticipated layoffs." 679 F.2d, at 551. By deciding whether the District Court erred in interpreting or modifying the consent decree so as to preclude the City from applying its seniority system, we do not, as the dissent shrills, attempt to answer a question never faced by the lower courts.

It is to be recalled that the "scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it" or by what "might have been written had the plaintiff established his factual claims and legal theories in litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681–682, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971). Here, as the District Court recognized, there is no mention of layoffs or demotions within the four corners of the decree; nor is there any suggestion of an intention to depart from the existing seniority system or from the City's arrangements with the Union. We cannot believe that the parties to the decree thought that the City would simply disregard its arrangements with the Union and the seniority system it was then following. Had there been any intention to depart from the seniority plan in the event of layoffs or demotions, it is much more reasonable to believe that there would have been an express provision to that effect. This is particularly true since the decree stated that it was not "intended to conflict with any provisions" of the 1974 decree, 679 F.2d, at 574 (Appendix), and since the latter decree expressly anticipated that the City would recognize seniority, *id.*, at 572. It is thus not surprising that when the City anticipated layoffs and demotions, it in the first instance faithfully followed its preexisting seniority system, plainly having no thought that it had already agreed to depart from it. It therefore cannot be said that the express terms of the decree contemplated that such an injunction would be entered.

[7] The argument that the injunction was proper because it carried out the purposes of the decree is equally unconvincing. The decree announced that its purpose was "to remedy past hiring and promotion practices" of the Department, *id.*, at 575–576, and to settle the dispute as to the "appropriate and valid procedures for hiring and promotion," *id.*, at 574. The decree went on to provide the agreed-upon remedy, but as we have indicated, that remedy did not include the displacement of white employees with seniority over blacks. Furthermore, it is reasonable to believe that the "remedy", which it was the purpose of the decree to provide, would not exceed the bounds of the remedies that are appropriate under Title VII, at least absent some express provision to that effect. As our cases have made clear, however, and as will be reemphasized below, Title VII protects bona fide seniority systems, and it is inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy in a pattern or practice suit such as this. We thus have no doubt that the City considered its system to be valid and that it had no intention of departing from it when it agreed to the 1980 decree.

Finally, it must be remembered that neither the Union nor the non-minority employees were parties to the suit when the 1980 decree was entered. Hence the entry of that decree cannot be said to indicate any agreement by them to any of its terms. Absent the presence of the Union or the non-minority employees and an opportunity for them to agree or disagree with any provisions of the decree that might encroach on their rights, it seems highly unlikely that the City would purport to bargain away non-minority rights under the then-existing seniority system. We therefore conclude that the injunction does not merely enforce the agreement of the parties as reflected in the consent decree. If the injunction is to stand, it must be justified on some other basis.

B

[8] The Court of Appeals held that even if the injunction is not viewed as compelling compliance with the terms of the decree, it was still properly entered because the District Court had inherent authority to modify the decree when an economic crisis unexpectedly required layoffs which, if carried out as the City proposed, would undermine the affirmative action outlined in the decree and impose an undue hardship on respondents. This was true, the court held, even though the modification conflicted with a bona fide seniority system adopted by the City. The Court of Appeals erred in reaching this conclusion.[9]

[9] Section 703(h) of Title VII provides that it is not an unlawful employment practice to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system, provided that such differences are not the result of an intention to discriminate because of race.[10] It is clear that the City had a seniority system, that its proposed layoff plan conformed to that system, and that in making the settlement the City had not agreed to award competitive seniority to any minority employee whom the City proposed to lay off. The District Court held that the City could not follow its seniority system in making its proposed layoffs because its proposal was discriminatory in effect and hence not a bona fide plan. Section 703(h), however, permits the routine application of a seniority system absent proof of an intention to discriminate. *Teamsters v. United States*, 431 U.S. 324, 352, 97 S.Ct. 1843, 1863, 52 L.Ed.2d 396 (1977). Here, the District Court itself found that the layoff proposal was not adopted with the purpose or intent to discriminate on the basis of race. Nor had the City in agreeing to the decree admitted in any way that it had engaged in intentional discrimination. The Court of Appeals was therefore correct in disagreeing with the District Court's holding that the layoff plan was not a bona fide application of the seniority system, and it would appear that the City could not be faulted for following the seniority plan expressed in its agreement with the Union. The Court of Appeals nevertheless held that the injunction was proper even though it conflicted with the seniority system. This was error.

[10] To support its position, the Court of Appeals first proposed a "settlement" theory, *i.e.*, that the strong policy favoring voluntary settlement of Title VII actions permitted consent decrees that encroached on seniority systems. But at this stage in its opinion, the Court of Appeals was supporting the proposition that even if the injunction was not merely enforcing the agreed-upon terms of the decree, the District Court had the authority to modify the decree over the objection of one of the parties. The settlement theory, whatever its merits might otherwise be, has no application when there is no "settlement" with respect to the disputed issue. Here, the agreed-upon decree neither awarded competitive seniority to the minority employees nor purported in any way to depart from the seniority system.

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[9] The dissent seems to suggest, *post*, at 2604–2605, and n. 9, and Justice STEVENS expressly states, *post*, at 2594, that Title VII is irrelevant in determining whether the District Court acted properly in modifying the consent decree. However, this was Title VII litigation, and in affirming modifications of the decree, the Court of Appeals relied extensively on what it considered to be its authority under Title VII. That is the posture in which the case comes to us. Furthermore, the District Court's authority to impose a modification of a decree is not wholly dependent on the decree. "[T]he District's Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree. *System Federation No. 91 v. Wright*, 364 U.S. 642, 651, 81 S.Ct. 368, 373, 5 L.Ed.2d 349 (1961). In recognition of this principle, this Court in *Wright* held that when a change in the law brought the terms of a decree into conflict with the statute pursuant to which the decree was entered, the decree should be modified over the objections of one of the parties bound by the decree. By the same token, and for the same reason, a district court cannot enter a disputed modification of a consent decree in Title VII litigation if the resulting order is inconsistent with that statute.

Thus, Title VII necessarily acted as a limit on the District Court's authority to modify the decree over the objections of the City; the issue cannot be resolved solely by reference to the terms of the decree and notions of equity. Since, as we note at ——, *infra*, Title VII precludes a district court from displacing a non-minority employee with seniority under the contractually established seniority system absent either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination, the District Court was precluded from granting such relief over the City's objection in this case.

[10] Section 703(h) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(h).

[11] A second ground advanced by the Court of Appeals in support of the conclusion that the injunction could be entered notwithstanding its conflict with the seniority system was the assertion that "[i]t would be incongruous to hold that the use of the preferred means of resolving an employment discrimination action decreases the power of a court to order relief which vindicates the policies embodied within Title VII, and 42 U.S.C. §§ 1981 and 1983." 679 F.2d, at 566. The court concluded that if the allegations in the complaint had been proved, the District Court could have entered an order overriding the seniority provisions. Therefore, the court reasoned, "[t]he trial court had the authority to override the Firefighter's Union seniority provisions to effectuate the purpose of the 1980 Decree." 679 F.2d, at 566.

The difficulty with this approach is that it overstates the authority of the trial court to disregard a seniority system in fashioning a remedy after a plaintiff has successfully proved that an employer has followed a pattern or practice having a discriminatory effect on black applicants or employees. If individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster. This much is clear from ***Franks v. Bowman Transportation Co.***, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) and *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). *Teamsters*, however, also made clear that mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him. 431 U.S., at 367–371, 97 S.Ct., at 1870–1872. Even when an individual shows that the discriminatory practice has had an impact on him, he is not automatically entitled to have a non-minority employee laid off to make room for him. He may have to wait until a vacancy occurs,[11] and if there are non-minority employees on layoff, the Court must balance the equities in determining who is entitled to the job. ***Teamsters, supra***, 431 U.S., at 371–376, 97 S.Ct., at 1872–1875. See also ***Ford Motor Co. v. EEOC***, 458 U.S. 219, 236–240, 102 S.Ct. 3057, 3068–3070, 73 L.Ed.2d 721 (1982). Here, there was no finding that any of the blacks protected from layoff had been a victim of discrimination and no award of competitive seniority to any of them. Nor had the parties in formulating the consent decree purported to identify any specific employee entitled to particular relief other than those listed in the exhibits attached to the decree. It therefore seems to us that in light of *Teamsters*, the Court of Appeals imposed on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed.

[12, 13] Our ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind § 706(g) of Title VII, which affects the remedies available in Title VII litigation.[12] That policy, which is to provide make-whole relief only to those who have been actual victims of illegal discrimination, was repeatedly expressed by the sponsors of the Act during the congressional debates. Opponents of the legislation that became Title VII charged that if the bill were enacted, employers could be ordered to hire and promote persons in order to achieve a racially-balanced work force even though those persons had not been victims of illegal discrimination.[13] Responding to these charges, Senator Humphrey explained the limits on a court's remedial powers as follows:

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[11] Lower courts have uniformly held that relief for actual victims does not extend to bumping employees previously occupying jobs. See e.g., *Patterson v. American Tobacco Co.*, 535 F.2d 257, 267 (CA4), *cert. denied*, 429 U.S. 920, 97 S.Ct. 314, 50 L.Ed.2d 286 (1976); *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980, 988 (CA5 1969), *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970).

> "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted without relevant change as § 706(g)] . . . Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require . . . firing . . . of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but is nonexistent." 110 Cong.Rec. 6549 (remarks of Sen. Humphrey).

An interpretative memorandum of the bill entered into the Congressional Record by Senators Clark and Case[14] likewise made clear that a court was not authorized to give preferential treatment to non-victims. "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of [Title VII]. This is stated expressly in the last sentence of section [706(g)]. . . ." *Id.*, at 7214.

[14] Similar assurances concerning the limits on a court's authority to award make-whole relief were provided by supporters of the bill throughout the legislative process. For example, following passage of the bill in the House, its Republican House sponsors published a memorandum describing the bill. Referring to the remedial powers given the courts by the bill, the memorandum stated: "Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. *But Title VII does not permit the ordering of racial quotas in business or unions* . . . ." *Id.*, at 6566 (emphasis added). In like manner, the principal Senate sponsors, in a bi-partisan news letter delivered during an attempted filibuster to each senator supporting the bill, explained that "[u]nder title VII, not even a Court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title." *Id.*, at 14465.[15]

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[12] Section 706(g) provides: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in such unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay or any other equitable relief as the court deems appropriate No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of § 704(a) of this title." 42 U.S.C. § 2000e-5(g).

[13] See H.R.Rep. No. 914, 88th Cong., 1st Sess. 72-73 (minority report), U.S.Code Cong. & Admin.News 1964, 2355; 110 Cong.Rec. 4764 (remarks of Sen. Ervin and Sen. Hill); *id.*, at 5092, 7418-20 (remarks of Sen. Robertson); *id.*, at 8500 (remarks of Sen. Smathers); *id.*, at 9034-35 (remarks of Sen. Stennis and Sen. Tower).

[14] Senators Clark and Case were the bipartisan "captains" of Title VII. We have previously recognized the authoritative nature of their interpretative memorandum. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 73, 102 S.Ct. 1534, 1539, 71 L.Ed.2d 748 (1982); *Teamsters, supra*, 431 U.S., at 352, 97 S.Ct., at 1863.

[15, 16] The Court of Appeals holding that the District Court's order was permissible as a valid Title VII remedial order ignores not only our ruling in *Teamsters* but the policy behind § 706(g) as well. Accordingly, that holding cannot serve as a basis for sustaining the District Court's order.[16]

[17, 18] Finally, the Court of Appeals was of the view that the District Court ordered no more than that which the City unilaterally could have done by way of adopting an affirmative action program. Whether the City, a public employer, could have taken this course without violating the law is an issue we need not decide. The fact is that in this case the City took no such action and that the modification of the decree was imposed over its objection.[17]

We thus are unable to agree either that the order entered by the District Court was a justifiable effort to enforce the terms of the decree to which the City had agreed or that it was a legitimate modification of the decree that could be imposed on the City without its consent. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

Justice O'CONNOR, concurring.

The various views presented in the opinions in this case reflect the unusual proce dural posture of the case and the difficulties inherent in allocating the burdens of recession and fiscal austerity. I concur in the Court's treatment of these difficult issues, and write separately to reflect my understanding of what the Court holds today.

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[15] The dissent suggests that Congress abandoned this policy in 1972 when it amended § 706(g) to make clear that a court may award "any other equitable relief" that the court deems appropriate. *Post*, at 2609–2610. As support for this proposition the dissent notes that prior to 1972, some federal courts had provided remedies to those who had not proven that they were victims. It then observes that in a section-by-section analysis of the bill, its sponsors stated that "in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 Cong.Rec. 7167 (1972).

We have already rejected, however, the contention that Congress intended to codify all existing Title VII decisions when it made this brief statement. See *Teamsters, supra*, 431 U.S., at 354, n. 39, 97 S.Ct., at 1864, n. 39. Moreover, the statement on its face refers only to those sections not changed by the 1972 amendments. It cannot serve as a basis for discerning the effect of the changes that were made by the amendment. Finally, and of most importance, in a later portion of the same section-by-section analysis, the sponsors explained their view of existing law and the effect that the amendment would have on that law:

"The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present § 706(g) *the courts have stressed that the scope of relief under that section of the Act is intended to make victims of unlawful discrimination whole*, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by the consequences and effects of the unlawful employment practice* be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Id.*, at 7168 (emphasis added).

As we noted in *Franks*, the 1972 amendments evidence "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible *the victims of racial discrimination*." 424 U.S., at 764, 96 S.Ct., at 1264 (emphasis added).

[16] Neither does it suffice to rely on the District Court's remedial authority under §§ 1981 and 1983. Under those sections relief is authorized only when there is proof or admission of intentional discrimination. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982). Neither precondition was satisfied here.

[17] The Court of Appeals also suggested that under *United States v. Swift & Co.*, 286 U.S. 106, 114–115, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932), the decree properly was modified pursuant to the District Court's equity jurisdiction. But *Swift* cannot be read as authorizing a court to impose a modification of a decree that runs counter to statutory policy, see n. 9, *supra*, here §§ 703(h) and 706(g) of Title VII.

I

To appreciate the Court's disposition of the mootness issue, it is necessary to place this case in its complete procedural perspective. The parties agree that the District Court and the Court of Appeals were presented with a "case or controversy" in every sense contemplated by Art. III of the Constitution. Respondents, as trial-plaintiffs, initiated the dispute, asking the District Court preliminarily to enjoin the City from reducing the percentage of minority employees in various job classifications within the Fire Department. Petitioners actively opposed that motion, arguing that respondents had waived any right to such relief in the consent decree itself and, in any event, that the reductions-in-force were bona fide applications of the citywide seniority system. When the District Court held against them, petitioners followed the usual course of obeying the injunction and prosecuting an appeal. They were, however, unsuccessful on that appeal.

Respondents now claim that the case has become moot on certiorari to this Court. The recession is over, the employees who were laid off or demoted have been restored to their former jobs, and petitioners apparently have no current need to make seniority-based layoffs. The res judicata effects of the District Court's order can be eliminated by the Court's usual practice of vacating the decision below and remanding with instructions to dismiss. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36 (1950). Thus, respondents conclude that the validity of the preliminary injunction is no longer an issue of practical significance and the case can be dismissed as moot. See Brief for Respondents 26–28.

I agree with the Court that petitioners and respondents continue to wage a controversy that would not be resolved by merely vacating the preliminary injunction. As a result of the District Court's order, several black employees have more seniority for purposes of future job decisions and entitlements than they otherwise would have under the city's seniority system. This added seniority gives them an increased expectation of future promotion, an increased priority in bidding on certain jobs and job transfers, and an increased protection from future layoffs. These individuals, who are members of the respondent class, have not waived their increased seniority benefits. Therefore, petitioners have a significant interest in determining those individuals' claims in the very litigation in which they were originally won. As the Court of Appeals noted, if petitioner-employer does not vigorously defend the implementation of its seniority system, it will have to cope with deterioration in employee morale, labor unrest, and reduced productivity. See *Stotts v. Memphis Fire Department*, 679 F.2d 541, 555, and n. 12 (CA6 1982); see also *Ford Motor Co. v. EEOC*, 458 U.S. 219, 229, 102 S.Ct. 3057, 3064, 73 L.Ed.2d 721 (1982). Likewise, if petitioner-union accedes to discriminatory employment actions, it will lose both the confidence of its members and bargaining leverage in the determination of who should ultimately bear the burden of the past (and future) fiscal shortages. See *ante*, at 2584, and n. 5. Perhaps this explains why, in respondents' words, "the city and union have expended substantial time and effort . . . in [an] appeal which can win no possible relief for the individuals on whose behalf it has ostensibly been pursued." Brief for Respondents 44.

When collateral effects of a dispute remain and continue to affect the relationship of litigants,[1] the case is not moot. See,

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[1] This case is distinguishable from *University of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981), where the Court found that a petitioner's objections to a prelimi

e.g., *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 755–757, 96 S.Ct. 1251, 1255–1260, 47 L.Ed.2d 444 (1976); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 121–125, 94 S.Ct. 1694, 1697–1699, 40 L.Ed.2d 1 (1974); *Gray v. Sanders*, 372 U.S. 368, 375–376, 83 S.Ct. 801, 805–806, 9 L.Ed.2d 821 (1963). In such cases, the Court does not hesitate to provide trial defendants with "a definitive disposition of their objections" on appeal, *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 440, 96 S.Ct. 2697, 2706, 49 L.Ed.2d 599 (1976), because vacating the res judicata effects of the decision would not bring the controversy to a close. See Note, Mootness on Appeal in the Supreme Court, 83 Harv.L.Rev. 1672, 1677–1687 (1970). As the Court wisely notes, "[litigants] cannot invoke the jurisdiction of a federal court . . . and then insulate [the effects of that court's] ruling from appellate review by claiming that they are no longer interested in the matter." *Ante*, at 2585.

II

My understanding of the Court's holding on the merits also is aided by a review of the place this case takes in the history of the parties' litigation. The city entered into a consent decree with respondents, agreeing to certain hiring and promotional goals, backpay awards, and individual promotions. The city was party both to another consent decree and to an agreement with the union concerning application of the seniority system at the time it made these concessions. Respondents did not seek the union's participation in the negotiation of their consent decree with the city, did not include the seniority system as a subject of negotiation, and waived all rights to seek further relief. When the current dispute arose, the District Court rejected respondents' allegation that the seniority system had been adopted or applied with any discriminatory animus. It held, however, that "modification" was appropriate because of the seniority system's discriminatory effects. Under these circumstances, the Court's conclusion that the District Court had no authority to order maintenance of racial percentages in the Department is, in my view, inescapable.

Had respondents presented a plausible case of discriminatory animus in the adoption or application of the seniority system, then the Court would be hard pressed to consider entry of the preliminary injunction an abuse of discretion. But that is not what happened here. To the contrary, the District Court rejected the claim of discriminatory animus, and the Court of Appeals did not disagree. Furthermore, the District Court's erroneous conclusion to the contrary, maintenance of racial balance in the Department could not be justified as a correction of an employment policy with an unlawful disproportionate impact. Title VII affirmatively protects bona fide seniority systems, including those with discriminatory effects on minorities. See *American Tobacco Co. v. Patterson*, 456 U.S. 63, 65, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982); *Teamsters v. United States*, 431 U.S. 324, 352, 97 S.Ct. 1843, 1863, 52 L.Ed.2d 396 (1977).

Therefore, the preliminary injunction could only be justified as a reasonable interpretation of the consent decree or as a permissible exercise of the District Court's authority to modify that consent decree. Neither justification was present here. For the reasons stated by the Court, *ante*, at 2586–2587, and Justice **STEVENS**, *post*,

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nary injunction, which required it to pay for the respondent's sign-language interpreter, were moot. In *Camenisch*, the propriety of issuing the preliminary injunction was really no longer of concern to the parties, and the real issue—who should pay for the interpreter—was better handled in a separate proceeding. *Id.*, at 394–398, 101 S.Ct., at 1833–1835. In this case, because the parties are in an ongoing relationship, they have a continuing interest in the propriety of the preliminary relief itself. *Camenisch* expressly distinguishes cases like this one, where the parties retain "a legally cognizable interest in the determination whether the preliminary injunction was properly granted[.]" *Id.*, at 394, 101 S.Ct., at 1833; see also *id.*, at 397, and n. 2, 101 S.Ct., at 1834, and n. 2.

at 2595, the consent decree itself cannot fairly be interpreted to bar use of the seniority policy or to require maintenance of racial balances previously achieved in the event layoffs became necessary. Nor can a district court unilaterally modify a consent decree to adjust racial imbalances or to provide retroactive relief that abrogates legitimate expectations of other employees and applicants. See *Steelworkers v. Weber,* 443 U.S. 193, 205–207, 99 S.Ct. 2721, 2728–2729, 61 L.Ed.2d 480 (1979); *Pasadena City Bd. of Education v. Spangler, supra,* 427 U.S., at 436–438, 96 S.Ct., at 2704–2705. A court may not grant preferential treatment to any individual or group simply because the group to which they belong is adversely affected by a bona fide seniority system. Rather, a court may use its remedial powers, including its power to modify a consent decree, only to prevent future violations and to compensate identified victims of unlawful discrimination. See *Teamsters v. United States, supra,* 431 U.S., at 367–371, 97 S.Ct., at 1870–1872; *Milliken v. Bradley,* 433 U.S. 267, 280–281, 97 S.Ct. 2749, 2757, 53 L.Ed.2d 745 (1977); see also *University of California Regents v. Bakke,* 438 U.S. 265, 307–309, and n. 44, 98 S.Ct. 2733, 2757–2758, and n. 44, 57 L.Ed.2d 750 (1978) (POWELL, J., announcing the judgment of the Court). Even when its remedial powers are properly invoked, a district court may award preferential treatment only after carefully balancing the competing interests of discriminatees, innocent employees, and the employer. See *Ford Motor Co. v. EEOC,* 458 U.S., at 239–240, 102 S.Ct., at 3070; *Teamsters v. United States, supra,* 431 U.S., at 371–376, 97 S.Ct., at 1872–1875. In short, no matter how significant the change in circumstance, a district court cannot unilaterally modify a consent decree to adjust racial balances in the way the District Court did here.[2]

To be sure, in 1980, respondents could have gone to trial and established illegal discrimination in the Department's past hiring practices, identified its specific victims, and possibly obtained retroactive seniority for those individuals. Alternatively, in 1980, in negotiating the consent decree, respondents could have sought the participation of the union,[3] negotiated the identities of the specific victims with the union and employer, and possibly obtained limited forms of retroactive relief. But respondents did none of these things. They chose to avoid the costs and hazards of litigating their claims. They negotiated with the employer without inviting the union's participation. They entered into a consent decree without establishing any specific victim's identity. And, most importantly, they waived their right to seek further relief. To allow respondents to obtain relief properly reserved for only identified victims or to prove their victim status now would undermine the certainty of obligation that is condition precedent to employers' acceptance of, and unions' consent to, employment discrimination settlements. See *Steelworkers v. Weber, supra,* 443 U.S., at 211, 99 S.Ct., at 2731 (BLACKMUN, J., concurring) (employers enter into settlements to avoid back pay responsibilities and to reduce disparate impact claims). Modifications requiring maintenance of racial balance would not encourage valid settlements[4] of employment discrimination cases. They would impede them. Thus, when the Court states that this preferential relief could not have been awarded even had *this case* gone to trial, see *ante*, at 2589, it is holding respondents to the bargain they struck during the consent decree negotiations in 1980 and thereby furthering the "statutory policy of voluntary settlement. See *Carson v. American Brands, Inc.*, 450 U.S. 79, 88, and n. 14, 101 S.Ct. 993, 998, and n. 14, 67 L.Ed.2d 59 (1981).

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[2] Unlike the dissenters and Justice STEVENS, I find persuasive the Court's reasons for holding Title VII relevant to analysis of the modification issue, see *ante,* at 2587, and n. 12, and the Court's application of Title VII's provisions to the facts of the present controversy.

[3] "Absent a judicial determination, the Company cannot alter the collective bargaining agreement without the Union's consent." *W.R. Grace & Co. v. Local 759,* 461 U.S. ——, ——, 103 S.Ct. 2177, 2179, 76 L.Ed.2d 298 (1983). Thus, if innocent employees are to be required to make any sacrifices in the final consent decree, they must be represented and have had full participation rights in the negotiation process.

[4] The policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees or applicants. See *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 278–296, 96 S.Ct. 2574, 2577–2586, 49 L.Ed.2d 493 (1976) (Title VII and 42

In short, the Court effectively applies the criteria traditionally applicable to the review of preliminary injunctions. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, 95 S.Ct. 2561, 2567, 45 L.Ed.2d 648 (1975). When the Court disapproves the preliminary injunction issued in this case, it does so because respondents had no chance of succeeding on the merits of their claim. The District Court had no authority to order the Department to maintain its current racial balance or to provide preferential treatment to blacks. It therefore abused its discretion. On this understanding, I join the opinion and judgment rendered by the Court today.

Justice STEVENS, concurring in the judgment.

The District Court's preliminary injunction remains reviewable because of its continuing effect on the city's personnel policies. That injunction states that the city may "not apply the seniority policy proposed insofar as it will decrease the percentage of black [persons] in the Memphis Fire Department."[1] Thus, if the city faces a need to lay off Fire Department employees in the future, it may not apply its seniority system. I cannot say that the likelihood that the city will once again face the need to lay off Fire Department employees is so remote that the city has no stake in the outcome of this litigation.[2]

In my judgment, the Court's discussion of Title VII is wholly advisory. This case involves no issue under Title VII; it only involves the administration of a consent decree. The District Court entered the consent decree on April 25, 1980, after having given all parties, including all of the petitioners in this Court, notice and opportunity to object to its entry. The consent decree, like any other final judgment of a district court, was immediately appealable. See *Carson v. American Brands, Inc.*, 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981). No appeal was taken. Hence, the consent decree became a final judgment binding upon those who had had notice and opportunity to object; it was and is a legally enforceable obligation. If the consent decree justified the District Court's preliminary injunction, then that injunction should be upheld irrespective of whether Title VII would authorize a similar injunction.[3]

U.S.C. § 1981 prohibit discrimination against whites as well as blacks); *Steelworkers v. Weber*, 443 U.S. 193, 208–209, 99 S.Ct. 2721, 2729–2730, 61 L.Ed.2d 480 (1979) (listing attributes that would make affirmative action plan impermissible); cf. *id.*, at 215, 99 S.Ct., at 2733 (BLACKMUN, J., concurring) ("seniority is not in issue because the craft training program is new and does not involve an abrogation of pre-existing seniority rights").

[1] See also *supra*, at 2581–2582, n. 6. There were actually three injunctive orders entered by the District Court, each applying to different positions in the Memphis Fire Department. All use substantially the same language.

[2] In this respect, this litigation is similar to *City of Los Angeles v. Lyons*, 461 U.S. ——, ——, 103 S.Ct. 1660, ——, 75 L.Ed.2d 675 (1983). There, an injunction against the use of chokeholds by the city's police department was held not to be moot despite the fact that the police board had instituted a voluntary moratorium of indefinite duration on chokeholds, since the likelihood that the city might one day wish to return to its former policy was not so remote as to moot the case. See also *Carroll v. Princess Anne*, 393 U.S. 175, 178–179, 89 S.Ct. 347, 350, 21 L.Ed.2d 325 (1968).

[3] The Court seems to suggest that a consent decree cannot authorize anything that would not constitute permissible relief under Title VII. *Ante*, at 2588. I share Justice BLACKMUN's doubts as to whether this is the correct test. See *post*, at 2605, n. 9, 2606–2607. The provisions on which the Court relies, 42 U.S.C. §§ 2000e–2(h) and 2000e–5(g), merely state that certain seniority arrangements do not violate

Therefore, what governs this case is not Title VII, but the consent decree.[4]

There are two ways in which the District Court's injunction could be justified. The first is as a construction of the consent decree. If the District Court had indicated that it was merely enforcing the terms of the consent decree, and had given some indication of what portion of that decree it was interpreting, I might be hard pressed to consider the entry of the injunction an abuse of discretion. However, the District Court never stated that it was construing the decree, nor did it provide even a rough indication of the portion of the decree on which it relied. There is simply nothing in the record to justify the conclusion that the injunction was based on a reasoned construction of the consent decree.[5]

The second justification that could exist for the injunction is that the District Court entered it based on a likelihood that it would modify the decree, or as an actual modification of the decree.[6] As Justice **BLACKMUN** explains, *post*, at 2602, 2605, modification would have been appropriate if respondents had demonstrated the presence of changed circumstances. However, the only "circumstance" found by the District Court was that the city's proposed layoffs would have an adverse effect on the level of black employment in the fire department. App. to Pet. for Cert. A73–A76. This was not a "changed" circumstance; the percentage of blacks employed by the Memphis Fire Department at the time the decree was entered meant that even then it was apparent that any future seniority-based layoffs would have an adverse effect on blacks. Thus the finding made by the District Court was clearly insufficient to support a modification of the consent decree, or a likelihood thereof.

Accordingly, because I conclude that the District Court abused its discretion in entering the preliminary injunction at issue here, I concur in the judgment.

Justice **BLACKMUN**, with whom Justice **BRENNAN** and Justice **MARSHALL** join, dissenting.

Today's opinion is troubling less for the law it creates than for the law it ignores. The issues in these cases arose out of a preliminary injunction that prevented the

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Title VII, and define the limits of appropriate relief for a Title VII violation, respectively. They do not place any limitations on what the parties can agree to in a consent decree. The Court does not suggest that any other statutory provision was violated by the District Court. The Court itself acknowledges that the administration of a consent decree must be tested by the four corners of the decree, and not by what might have been ordered had respondents prevailed on the merits, *ante*, at 2586, which makes its subsequent discussion of Title VII all the more puzzling.

[4] If the decree had been predicated on a finding that the city had violated Title VII, the remedial policies underlying that Act might be relevant, at least as an aid to construction of the decree. But since the settlement expressly disavowed any such finding, the Court's exposition of Title VII law is unnecessary.

[5] Justice **BLACKMUN** explains, *post*, at 2603–2605, how the consent decree could be construed to justify the injunction. I find nothing in the record indicating that this is the theory the District Court actually employed. While I recognize that preliminary injunction proceedings are often harried affairs and that district courts need substantial leeway in resolving them, it nevertheless remains the case that there must be something in the record explaining the reasoning of the District Court before it may be affirmed. That is the purpose of Fed.Rule Civ.P. 65(d)'s requirement that "[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance ...."

[6] It seems likely that this second justification was the actual basis for the entry of the injunction. The District Court's phrasing of the question it faced was whether "it should exercise its authority to modify a Consent Decree." App. to Pet. for Cert. A73. The focus of the Court of Appeals' opinion reviewing the preliminary injunction was the "three grounds upon which a Consent Decree may later be modified." *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 560 (CA6 1981). Most important, the practical effect of the District Court's action indicates that it should be treated as a modification. Until it is reviewed, it will effectively govern the procedure that the city must follow in any future layoffs, and that procedure is significantly different from the seniority system in effect when the consent decree was negotiated and signed.

city of Memphis from conducting a particular layoff in a particular manner. Because that layoff has ended, the preliminary injunction no longer restrains any action that the city wishes to take. The Court nevertheless rejects respondents' claim that these cases are moot because the Court concludes that there are continuing effects from the preliminary injunction and that these create a continuing controversy. The Court appears oblivious, however, to the fact that any continuing legal consequences of the preliminary injunction would be erased by simply vacating the Court of Appeals' judgment, which is this Court's longstanding practice with cases that become moot.

Having improperly asserted jurisdiction, the Court then ignores the proper standard of review. The District Court's action was a preliminary injunction reviewable only on an abuse of discretion standard; the Court treats the action as a permanent injunction and decides the merits, even though the District Court has not yet had an opportunity to do so. On the merits, the Court ignores the specific facts of these cases that make inapplicable the decisions on which it relies. Because, in my view, the Court's decision is demonstrably in error, I respectfully dissent.

I

Mootness. "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review and not simply at the date the action is initiated." *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 712, 35 L.Ed.2d 147 (1973). In the absence of a live controversy, the constitutional requirement of a "case" or "controversy," see U.S. Const., Art. III, deprives a federal court of jurisdiction. Accordingly, a case, although live at the start, becomes moot when intervening acts destroy the interest of a party to the adjudication. *DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). In such a situation, the federal practice is to vacate the judgment and remand the case with a direction to dismiss. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36 (1950).

Application of these principles to the present cases is straightforward. The controversy underlying the suits is whether the city of Memphis' proposed layoff plan violated the 1980 consent decree. The District Court granted a preliminary injunction limiting the proportion of Negroes that the city could layoff as part of its efforts to solve its fiscal problems. Because of the injunction, the city chose instead to reduce its workforce according to a modified layoff plan under which some whites were laid off despite their greater seniority over the blacks protected by the preliminary injunction. Since the preliminary injunction was entered, however, the layoffs all have terminated and the city has taken back every one of the workers laid off pursuant to the modified plan. Accordingly, the preliminary injunction no longer restrains the city's conduct, and the adverse relationship between the opposing parties concerning its propriety is gone. A ruling in this situation thus becomes wholly advisory, and ignores the basic duty of this Court " 'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' " *Oil Workers v. Missouri*, 361 U.S. 363, 367, 80 S.Ct. 391, 394, 4 L.Ed.2d 373 (1960), quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895). The proper disposition, therefore, is to vacate the judgment and remand the cases with directions to dismiss them as moot.

The purpose of vacating a judgment when it becomes moot while awaiting review is to return the legal relationships of the parties to their status prior to initiation of the suit. The Court explained in *Munsingwear* that vacating a judgment

> "clears the path for future relitigation of the issues between the parties and elimi-

nates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." 340 U.S., at 40, 71 S.Ct., at 107.

Were the Court to follow this procedure in these cases, as clearly it should, the legal rights of the parties would return to their status prior to entry of the preliminary injunction. In the event that future layoffs became necessary, respondents would have to seek a new injunction based on the facts presented by the new layoffs, and petitioners could oppose the new injunction on any and all grounds, including arguments similar to those made in these cases.

Struggling to find a controversy on which to base its jurisdiction, the Court offers a variety of theories as to why these cases remain live. First, it briefly suggests that the cases are not moot because the preliminary injunction continues in effect and would apply in the event of a future layoff. My fundamental disagreement with this contention is that it incorrectly interprets the preliminary injunction.[1] Even if the Court's interpretation of the preliminary injunction is correct, however, it is nonetheless true that if the judgment in these cases were vacated, the preliminary injunction would not apply to a future layoff.

The Court's second argument against mootness is remarkable. The Court states that even if the preliminary injunction applies only to the 1981 layoffs, the "rulings" that formed the "predicate" for the preliminary injunction "remain undisturbed." *Ante*, at 2583. The Court then states:

> "[W]e see no indication that respondents concede in urging mootness that these rulings were in error and should be reversed. To the contrary, they continue to defend them. Unless overturned, these rulings would require the City to obey the modified consent decree and to disregard its seniority agreement in making future layoffs." *Ibid.*

Two aspects of this argument provoke comment. It is readily apparent that vacating the judgment in these cases would also vacate whatever "rulings" formed the "predicate" for that judgment. There simply is no such thing as a "ruling" that has a life independent of the judgment in these cases and that would bind the city in a future layoff if the judgment in these cases were vacated. The Court's argument, therefore, is nothing more than an oxymoronic suggestion that the judgment would somehow have a res judicata effect even if it was vacated—a complete contradiction in terms.

Moreover, and equally remarkable, is the notion that respondents must concede that the rulings below were in error before they can argue that the case is moot. To my knowledge, there is nothing in this Court's mootness doctrine that requires a party urging mootness to concede the lack of merit in his case. Indeed, a central purpose of mootness doctrine is to avoid an unnecessary ruling on the merits.

The Court's third argument against mootness focuses on the wages and seniority lost by white employees during the peri od of their layoffs—and it is undisputed that some such pay and seniority were lost. The Court does not suggest, however, that its decision today will provide the affected workers with any backpay or seniority. It is clear that any such backpay or retroactive seniority for laidoff workers would have to come from the city, not from respondents.[2] But the city and the union are both *petitioners* here, not adversaries, and respondents have no interest in defending the city from liability to the union in a separate proceeding. For that reason, these suits involve the wrong adverse parties for resolution of any issues of backpay and seniority.

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[1] It is readily apparent from the terms of the preliminary injunction that it applied only to the layoffs contemplated in May 1981, and that the union would have to seek a new injunction if it sought to stop layoffs contemplated in the future. The preliminary injunction applied only to the positions—lieutenant, driver, inspector, and private—in which demotions or layoffs were then planned. It makes little sense to interpret this preliminary injunction to apply to future layoffs that might involve different positions. In addition, the minimum percentage of Negroes that the city was to retain was that of blacks "presently employed" in those positions, a standard that has no pertinence if applied to future layoffs when minority employment levels would be higher than in 1981. App. to Pet. for Cert. in No. 82-229, p. A77. Finally, the reasoning of the District Court in granting the preliminary injunction was based expressly on "the effect of *these* layoffs and reductions in rank." *Id.*, at A78 (emphasis supplied). Thus, it is clear that the District Court viewed the preliminary injunction as a response to the problem presented by the May 1981 layoffs rather than to the problem of layoffs generally.

The Court, nevertheless, suggests that the backpay and seniority issues somehow keep these cases alive despite the absence of an adversarial party. The Court states:

> "Unless the judgment of the Court of Appeals is reversed, however, the layoffs and demotions were in accordance with the law, and it would be quite unreasonable to expect the City to pay out money to which the employees had no legal right. Nor would it feel free to respond to the seniority claims of the three white employees who . . . lost competitive seniority in relation to all other individuals who were not laid off, including those minority employees who would have been laid off but for the injunction. On the other hand, if the Court of Appeals' judgment is reversed, the City would be free to take a wholly different position with respect to back pay and seniority." *Ante*, at 2584 (footnote omitted).

Although the artful ambiguity of this passage renders it capable of several interpretations, none of them provides a basis on which to conclude that these cases are not moot. The Court may mean to suggest that the city has no legal obligation to provide backpay and retroactive seniority, but that it might voluntarily do so if this Court opines that the preliminary injunction was improper. A decision in that situation, however, would be an advisory opinion in the full sense—it would neither require nor permit the city to do anything that it cannot do already.

It is more likely that the Court means one of two other things. The Court may mean that if the Court of Appeals' decision is left standing, it would have some kind of preclusive effect in a suit for back pay and retroactive seniority brought by the union against the city. Alternatively, the Court may mean that if the city sought voluntarily to give union members the back pay and retroactive seniority that they lost, the respondents could invoke the preliminary injunction to prohibit the city from doing so.

Even if both of these notions were correct—which they clearly are not, see *infra*, at 2583-2584, and nn. 3, 4, and 5—they are irrelevant to the question of mootness. The union has not filed a suit for backpay or seniority, nor has the preliminary injunction prevented the city from awarding retroactive seniority to the laidoff workers. Accordingly, these issues simply are not in the cases before the Court, and have no bearing on the question of mootness. In *Oil Workers v. Missouri, supra*, for example, the Court declined to review an expired antistrike injunction issued pursuant to an allegedly unconstitutional state statute, even though the challenged statute also governed a monetary penalty claim pending in state court against the union. The Court stated: " '[T]hat suit is not before us. We have not now jurisdiction of it or its issues. *Our power only extends over and is limited by the conditions of the case now before us.*' " 361 U.S., at 370, 80 S.Ct., at 396 (emphasis added), quoting *American Book Co. v. Kansas*, 193 U.S. 49, 52, 24 S.Ct. 394, 395, 48 L.Ed. 613

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[2] In the event that the laidoff firefighters were to bring a successful action for backpay against the city, the city would have no claim for reimbursement against respondents for securing an allegedly erroneous injunction. No bond was posted for the preliminary injunction, and "[a] party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond." *W.R. Grace & Co. v. Local Union 759*, — U.S. —, —, n. 14, 103 S.Ct. 2177, 2185, n. 14, 76 L.Ed.2d 298 (1983).

(1904). By vacating this judgment as moot, the Court would ensure that in the event that a controversy over backpay and retroactive seniority should arise, the parties in these cases could relitigate any issues concerning the propriety of the preliminary injunction as it relates to that controversy. Thus, the Court today simply has its reasoning backwards. It pretends that these cases present a live controversy because the judgment in them might affect future litigation; yet the Court's longstanding practice of vacating moot judgments is designed precisely to prevent that result.

By going beyond the reach of the Court's Article III powers, today's decision improperly provides an advisory opinion for the city and the union. With regard to the city's ability to give retroactive seniority and backpay to laidoff workers, respondents concede that neither the preliminary injunction nor the Court of Appeals' judgment prohibits the city from taking such action.[3] Brief for Respondents 30–31. The city has not claimed any confusion over its ability to make such an award; it simply has chosen not to do so. Thus, the opinion today provides the city with a decision to ensure that it can do something that it has not claimed any interest in doing and has not been prevented from doing, and that respondents concede they have no way of stopping.

With regard to the union, the Court's imagined controversy is even more hypothetical. The Court concedes that there is doubt whether, in fact, the union possesses any enforceable contractual rights that could form the basis of a contract claim by the union against the city.[4] It is also unclear how the propriety of the preliminary injunction would affect the city's defenses in such a suit.[5] In any event, no such claims have been filed. Thus, today's decision is provided on the theory that it might affect a defense that the city has not asserted, in a suit that the union has not brought, to enforce contractual rights that may not exist.

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[3] It was the city's layoff policy, not the preliminary injunction, that prevented the laidoff workers from accruing seniority during their layoffs. Paragraph 6B of "Benefits" of the city's written "Layoff Policy," adopted unilaterally by the city in April 1981, states: "Employees shall not receive seniority credit during their layoff period." App. 95. If the laidoff workers are to receive retroactive seniority, it will be because the city chooses to change this policy—which they always have been free to do—not because the preliminary injunction has been invalidated. Although the Court feigns uncertainty on this matter, *ante*, at 2584, n. 5, as does Justice O'CONNOR in her separate opinion, *ante*, at 2581, there is simply no indication in these cases that the city wants to give the laidoff workers retroactive seniority but is unable to do so because of the preliminary injunction.

[4] It appears that if the union enjoys any contractual rights at all, they derive from the "Memorandum of Understanding" between the union and the city, which indicates that layoffs shall be made on the basis of seniority. App. to Pet. for Cert. in No. 82-206, p. A81. The Tennessee Supreme Court recently has confirmed, however, that the Memorandum of Understanding confers no enforceable rights, *Fulenwider v. Firefighters Association Local Union 1784*, 649 S.W.2d 268 (1982), because of state law limits on the authority of municipalities to contract with labor organizations. Thus, the likely reason that the union has not filed a suit for backpay is because it has no enforceable rights.

I am at somewhat of a loss trying to understand the Court's suggestion that the District Court's preliminary injunction somehow prevented contract liability from arising between the city and the affected white employees. As is explained more fully, *infra*, the preliminary injunction did not require the city to layoff anyone. The preliminary injunction merely prohibited the city from laying off more than a certain proportion of Negroes. In the face of that constraint, the city decided to proceed with layoffs and to lay off whites instead of the protected Negroes. If in so doing the city breached contractual rights of the white employees, those rights remained enforceable. See *W.R. Grace & Co. v. Local Union 759*, *supra* (employer could be held liable for breach of collective bargaining agreement when, because women employees were protected by an injunction, it laid off male employees with greater seniority).

[5] An enjoined party is required to obey an injunction issued by a federal court within its jurisdiction even if the injunction turns out on review to have been erroneous, and failure to obey such an injunction is punishable by contempt. *Walker v. City of Birmingham*, 388 U.S. 307, 314, 87 S.Ct. 1824, 1828, 18 L.Ed.2d 1210 (1967). Given that the city could have been punished for contempt if it had disregarded the preliminary injunction, regardless of whether the injunction on appeal were found erroneous, it seems unlikely that a defense to a breach of contract would turn on whether the preliminary injunction is upheld on appeal as opposed to the

II

Because there is now no justiciable controversy in these cases, today's decision by the Court is an improper exercise of judicial power. It is not my purpose in dissent to parallel the Court's error and speculate on the appropriate disposition of these nonjusticiable cases. In arriving at its result, however, the Court's analysis is misleading in many ways, and in other ways it is simply in error. Accordingly, it is important to note the Court's unexplained departures from precedent and from the record.

A

Assuming *arguendo* that these cases are justiciable, then the only question before the Court is the validity of a ***preliminary*** injunction that prevented the city from conducting layoffs that would have reduced the number of Negroes in certain job categories within the Memphis Fire Department. In granting such relief, the District Court was required to consider respondents' likelihood of success on the merits, the balance of irreparable harm to the parties, and whether the injunction would be in the public interest. *University of Texas v. Camenisch,* 451 U.S. 390, 392, 101 S.Ct. 1830, 1832, 68 L.Ed.2d 175 (1981); *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 931, 95 S.Ct. 2561, 2567, 45 L.Ed.2d 648 (1975). The question before a reviewing court "is simply whether the issuance of the injunction, in light of the applicable standard, constituted an abuse of discretion." *Id.,* at 932, 95 S.Ct., at 2568.

The Court has chosen to answer a different question. The Court's opinion does not mention the standard of review for a preliminary injunction, and does not apply that standard to these cases. Instead, the Court treats the cases as if they involved a ***permanent*** injunction, and addresses the question whether the city's proposed layoffs violated the consent decree.[6] That issue was never resolved in the District Court because the city did not press for a final decision on the merits. The issue, therefore, is not properly before this Court. After taking jurisdiction over a controversy that no longer exists, the Court reviews a decision that was never made.

In so doing, the Court does precisely what in *Camenisch, supra,* it unanimously concluded was error. *Camenisch* involved a suit in which a deaf student obtained a preliminary injunction requiring that the University of Texas pay for an interpreter to assist him in his studies. While appeal

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city's obligation to obey the injunction when entered.

[6] The Court's attempt to recharacterize the preliminary injunction as a permanent one is wholly unpersuasive. Respondents' request for injunctive relief specifically sought a preliminary injunction, and carefully laid out the standards for the issuance of such an injunction. App. 20–22. Petitioners' response in opposition to the request for injunctive relief was devoted entirely to explaining that the standards for a preliminary injunction had not been met. *Id.,* at 25–28. The District Court's order granting injunctive relief was entitled an "Order Granting Preliminary Injunction," and a later order expanding the injunctive relief to include more positions was entitled an "Order Expanding Preliminary Injunction." App. to Pet. for Cert. in No. 82–229, pp. A77, A82. The Court of Appeals expressly defined the nature of its inquiry by stating:

> "We must weigh whether the plaintiffs have shown a possibility of success on the merits, whether the plaintiff or defendant would suffer irreparable harm and whether the public interest warrants the injunction The standard of appellate review is whether the district court abused its discretion in granting the preliminary injunction.
>
> "[The District Judge] did not abuse his discretion in granting the preliminary injunction." 679 F.2d 541, 560 (CA6 1982).

It is hard to imagine a clearer statement that the issue considered by the Court of Appeals was the propriety of a preliminary injunction. In any event, even if the Court of Appeals went beyond the scope of its appropriate review, it would be our duty to correct that error, not to follow it.

of the preliminary injunction was pending before the Court of Appeals, the student graduated. The Court of Appeals affirmed the District Court. In so doing, the appellate court rejected Camenisch's suggestion that his graduation rendered the case moot because the District Court had required Camenisch to post a bond before granting the preliminary injunction, and there remained the issue whether the University or Camenisch should bear the cost of the interpreter. This Court granted certiorari and vacated and remanded the case to the District Court. The Court explained:

> "The Court of Appeals correctly held that the case as a whole is not moot, since, as that Court noted, it remains to be decided who should ultimately bear the cost of the interpreter. However, *the issue before the Court of Appeals was not who should pay for the interpreter, but rather whether the District Court had abused its discretion in issuing a preliminary injunction requiring the University to pay for him* .... *The two issues are significantly different, since whether the preliminary injunction should have issued depended on the balance of factors [for granting preliminary injunctions], while whether the University should ultimately bear the cost of the interpreter depends on a final resolution of the merits of Camenisch's case.*
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> . . . . .
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> *Until [a trial on the merits] has taken place, it would be inappropriate for this Court to intimate any view on the merits of the lawsuit."* 451 U.S., at 393, 398, 101 S.Ct., at 1835 (emphasis added).

Camenisch makes clear that a determination of a party's entitlement to a preliminary injunction is a separate issue from the determination of the merits of the party's underlying legal claim, and that a reviewing court should not confuse the two. Even if the issues presented by the preliminary injunction in these cases were not moot, therefore, the only issue before this Court would be the propriety of preliminary injunctive relief.[7] See, also, *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 716, 101 S.Ct. 2599, 2600, 69 L.Ed.2d 357 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S., at 931–932, 934, 95 S.Ct., at 2567–2568, 2569. It is true, of course, that the District Court and the Court of Appeals had to make a preliminary evaluation of respondents' likelihood of success on the merits, but that evaluation provides no basis for deciding the merits:

> "Since Camenisch's likelihood of success on the merits was one of the factors the District Court and the Court of Appeals considered in granting Camenisch a preliminary injunction, it might be suggested that their decisions were tantamount to decisions on the underlying merits and thus that the preliminary-injunction issue is not truly moot.... *This reasoning fails, however, because*

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[7] The distinction between the preliminary and final injunction stages of a proceeding is more than mere formalism. The time pressures involved in a request for a preliminary injunction require courts to make determinations without the aid of full briefing or factual development, and make all such determinations necessarily provisional. Like the proceedings in *Camenisch*, those in this litigation "bear the marks of the haste characteristic of a request for a preliminary injunction." 451 U.S., at 398, 101 S.Ct., at 1835. The hearing on the preliminary injunction was held four days after the layoffs had been announced. With the exception of a single deposition the day before the hearing, there was no discovery. In opening the hearing, the trial judge noted: "One of the problems with these injunction hearings centers around the fact that the lawyers don't have the usual time to develop the issues, and take discovery, and exchange information, and to call on each other to state what they think the issues are I got an idea from the lawyers—I am not sure that they were finally decided on what route they were going " App. 30. It is true that the District Court made a few of what generously could be described as findings and conclusions, but, as the Court in *Camenisch* pointed out, "findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." 451 U.S., at 395, 101 S.Ct., at 1834. Accordingly, there is simply no proper basis on which this Court legitimately can decide the question whether the city's proposed layoffs violated the consent decree.

it improperly equates 'likelihood of success' with 'success,' and what is more important, because it ignores the significant procedural differences between preliminary and permanent injunctions." 451 U.S., at 394, 101 S.Ct., at 1833 (emphasis added).

B

After ignoring the appropriate standard of review, the Court then focuses on an issue that is not in these cases. It begins its analysis by stating that the "issue at the heart of this case" is the District Court's power to "ente[r] an injunction requiring white employees to be laid off." *Ante,* at 2585. That statement, with all respect, is simply incorrect. On its face, the preliminary injunction prohibited the city from conducting layoffs in accordance with its seniority system "insofar as it will decrease the percentage of black[s] … presently employed" in certain job categories. App. to Pet. for Cert. in No. 82-229, p. A80. The preliminary injunction did not require the city to lay off any white employees at all. In fact, several parties interested in the suit, including the union, attempted to persuade the city to avoid layoffs entirely by reducing the working hours of all fire department employees. See Brief for Respondents 73. Thus, although the District Court order reduced the city's options in meeting its fiscal crisis, it did not require the dismissal of white employees. The choice of a modified layoff plan remained that of the city.

This factual detail is important because it makes clear that the preliminary injunction did not abrogate the contractual rights of white employees. If the modified layoff plan proposed by the city to comply with the District Court's order abrogated contractual rights of the union, those rights remained enforceable. This Court recognized this principle just last Term in *W.R. Grace & Co. v. Local Union 759,* — U.S. —, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983), which presented a situation remarkably similar to the one here. In that case, an employer sought to conduct layoffs and faced a conflict between a Title VII conciliation agreement protecting its female employees and the seniority rights of its male employees. The employer chose to lay off male employees, who filed grievances and obtained awards for the violation of their contractual rights. In upholding the awards, this Court explained that the dilemma faced by the employer did not render the male employees' contractual rights unenforceable:

> "Given the Company's desire to reduce its workforce, it is undeniable that the Company was faced with a dilemma: it could follow the conciliation agreement as mandated by the District Court and risk liability under the collective bargaining agreement, or it could follow the bargaining agreement and risk both a contempt citation and Title VII liability. The dilemma, however, was of the Company's own making. The Company committed itself voluntarily to two conflicting contractual obligations." *Id.,* at —, 103 S.Ct., at 2184.

It is clear, therefore, that the correctness of the District Court's interpretation of the decree is irrelevant with respect to the enforceability of the union's contractual rights; those rights remained enforceable regardless of whether the city had an obligation not to lay off blacks.[8] The question in these cases remains whether the District Court's authority pursuant to the consent decree enabled it to enjoin a layoff of more than a certain number of blacks. The issue is not whether the District Court could require the city to layoff whites, or whether the District Court could abrogate contractual rights of white firefighters.

III

Assuming, as the Court erroneously does, that the District Court entered a permanent injunction, the question on review then would be whether the District Court had authority to enter it. In affirming the District Court, the Court of Appeals suggested at least two grounds on which respondents might have prevailed on the merits.

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[8] Judge Martin's opinion concurring in part and dissenting in part from the Sixth Circuit's decision is based on precisely this point. See 679 F.2d, at 569.

The first of these derives from the contractual characteristics of a consent decree. Because a consent decree "is to be construed for enforcement purposes essentially as a contract," *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238, 95 S.Ct. 926, 935, 43 L.Ed.2d 148 (1975), respondents had the right to specific performance of the terms of the decree. If the proposed layoffs violated those terms, the District Court could issue an injunction requiring compliance with them. Alternatively, the Court of Appeals noted that a court of equity has inherent power to modify a consent decree in light of changed circumstances. 679 F.2d 541, 560–561 (CA6 1982). Thus, if respondents could show that changed circumstances justified modification of the decree, the District Court would have authority to make such a change.

Respondents based their request for injunctive relief primarily on the first of these grounds, and the Court's analysis of this issue is unpersuasive. The District Court's authority to enforce the terms and purposes of the consent decree was expressly reserved in ¶ 17 of the decree itself: "The Court retains jurisdiction of this action for such further orders as may be necessary or appropriate to effectuate the purposes of this decree." App. to Pet. for Cert. in No. 82–229, p. A69. Respondents relied on that provision in seeking the preliminary injunction. See Plaintiffs' Supplemental Memorandum in Support of a Preliminary Injunction 1. The decree obligated the city to provide certain specific relief to particular individuals, and to pursue a long-term goal to "raise the black representation in each job classification on the fire department to levels approximating the black proportion of the civilian labor force in Shelby County." App. to Pet. for Cert. in No. 82–229, p. A64. The decree set more specific goals for hiring and promotion opportunities as well. To meet these goals, the decree "require[d] reasonable, good faith efforts on the part of the City." *Ibid.*

In support of their request for a preliminary injunction, respondents claimed that the proposed layoffs would adversely affect blacks significantly out of proportion to their representation. Supplemental Memorandum in Support of a Preliminary Injunction, pp. 1-2. They argued that the proposed layoffs were "designed to thwart gains made by blacks" under the decree. *Id.*, at 2. Their argument emphasized that the Mayor had "absolute discretion to choose which job classifications" were to be affected by the layoffs, *ibid.*, and that the "ranks chosen by the Mayor for demotion are those where blacks are represented in the greatest number." *Id.*, at 4. Respondents claimed that such a layoff plan "violates the spirit of the 1980 Consent Decree." *Id.*, at 3. Had respondents been able to prove these charges at trial, they may well have constituted a violation of the city's obligation of good faith under the decree. On the basis of these claims, the limited evidence presented at the hearing prior to the issuance of the preliminary injunction, and the District Court's familiarity with the city's past behavior, the District Court enjoined the city from laying off blacks where the effect would have been to reduce the percentage of black representation in certain job categories. By treating the District Court's injunction as a permanent one, however, the Court first deprives respondents of the opportunity to substantiate these claims, and then faults them for having failed to do so. But without determining whether these allegations have any substance, there is simply no way to determine whether the proposed layoff plan violated the terms of the consent decree.

Even if respondents could not have shown that the proposed layoff plan conflicted with the city's obligation of good faith, ¶ 17 of the Decree also empowered the District Court to enter orders to "effectuate the purposes" of the decree. Thus, if the District Court concluded that the layoffs would frustrate those purposes, then the decree empowered the District Court to enter an appropriate order. Once again, however, on the limited factual record before the Court, it is improper to speculate about whether the layoffs would have frustrated the gains made under the consent decree sufficiently to justify a permanent injunction.

The Court rejects the argument that the injunctive relief was a proper exercise of the power to enforce the purposes of the decree principally on the ground that the remedy agreed upon in the consent decree did not specifically mention layoffs. *Ante*, at 2586. This treatment of the issue is inadequate. The power of the District Court to enter further orders to effectuate the purposes of the decree was a part of the agreed remedy. The parties negotiated for this, and it is the obligation of the courts to give it meaning. In an ideal world, a well-drafted consent decree requiring structural change might succeed in providing explicit directions for all future contingencies. But particularly in civil rights litigation in which implementation of a consent decree often takes years, such foresight is unattainable. Accordingly, parties to a consent decree typically agree to confer upon supervising courts the authority to ensure that the purposes of a decree are not frustrated by unforeseen circumstances. The scope of such authority in an individual case depends principally upon the intent of the parties. Viewed in this light, recourse to such broad notions as the "purposes" of a decree is not a rewriting of the parties' agreement, but rather a part of the attempt to implement the written terms. The District Judge in these cases, who presided over the negotiation of the consent decree, is in a unique position to determine the nature of the parties' original intent, and he has a distinctive familiarity with the circumstances that shaped the decree and defined its purposes. Accordingly, he should be given special deference to interpret the general and any ambiguous terms in the decree. It simply is not a sufficient response to conclude, as the Court does, that the District Court could not enjoin the proposed layoff plan merely because layoffs were not specifically mentioned in the consent decree.

In this regard, it is useful to note the limited nature of the injunctive relief ordered by the District Court. The preliminary injunction did not embody a conclusion that the city could never conduct layoffs in accordance with its seniority policy. Rather, the District Court preliminarily enjoined a particular application of the seniority system as a basis for a particular set of layoffs. Whether the District Court would enjoin a future layoff presumably would depend on the factual circumstances of that situation. Such a future layoff presumably would affect a different proportion of blacks and whites, the black representation in the fire department presumably would be higher, the layoffs presumably would negate a smaller portion of the gains made under the decree, and the judge would have worked with the parties at implementing the decree for a longer period of time. There is no way of knowing whether the District Court would conclude that a future layoff conducted on the basis of seniority would frustrate the purposes of the decree sufficiently to justify an injunction. For this reason, the Court is wrong to attach such significance to the fact that the consent decree does not provide for a suspension of the seniority system during all layoffs, for that is not what the District Court ordered in these cases.

B

The Court of Appeals also suggested that respondents could have prevailed on the merits because the 1981 layoffs may have justified a modification of the consent decree. This Court frequently has recognized the inherent "power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent." *United States v. Swift*

& Co., 286 U.S. 106, 114, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932); accord, *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 437, 96 S.Ct. 2697, 2705, 49 L.Ed.2d 599 (1976); *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 251, 88 S.Ct. 1496, 1500, 20 L.Ed.2d 562 (1968). "The source of the power to modify is of course the fact that an injunction often requires a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *System Federation v. Wright*, 364 U.S. 642, 647, 81 S.Ct. 368, 371, 5 L.Ed.2d 349 (1961). The test for ruling on a plaintiff's request for a modification of a consent decree is "whether the change serve[s] to effectuate the basic purpose of the original consent decree." *Chrysler Corp. v. United States*, 316 U.S., at 562, 62 S.Ct., at 1149.

The Court rejects this ground for affirming the preliminary injunction, not by examining the purposes of the *consent decree* and whether the proposed layoffs justified a modification of the decree, but rather by reference to Title VII. The Court concludes that the preliminary injunction was improper because it "imposed on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed." *Ante*, at 2588. Thus, the Court has chosen to evaluate the propriety of the preliminary injunction by asking what type of relief the District Court could have awarded had respondents litigated their Title VII claim and prevailed on the merits. Although it is far from clear whether that is the right question,[9] it is clear that the Court has given the wrong answer.

Had respondents prevailed on their Title VII claims at trial, the remedies available would have been those provided by § 706(g), 42 U.S.C. § 2000e–5(g). Under that section, a court that determines that an employer has violated Title VII may "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay . . . , *or any other equitable relief as the court deems appropriate*" (emphasis added). The scope of the relief that could have been entered on behalf of respondents had they prevailed at trial therefore depends on the nature of relief that is "appropriate" in remedying Title VII violations.

In determining the nature of "appropriate" relief under § 706(g), courts have distinguished between individual relief and race-conscious class relief. Although overlooked by the Court, this distinction is highly relevant here. In a Title VII class-action suit of the type brought by respondents, an individual plaintiff is entitled to an award of individual relief only if he can establish that he was the victim of discrimination. That requirement grows out of the general equitable principles of "make whole" relief; an individual who has suffered no injury is not entitled to an individual award. See *Teamsters v. United States*, 431 U.S. 324,

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[9] The Court's analysis seems to be premised on the view that a consent decree cannot provide relief that could not be obtained at trial. In addressing the Court's analysis, I do not mean to imply that I accept its premise as correct. In *Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), this Court considered whether an affirmative action plan adopted voluntarily by an employer violated Title VII because it discriminated against whites. In holding that the plan was lawful, the Court stressed that the voluntariness of the plan informed the nature of its inquiry. *Id.*, at 200, 99 S.Ct., at 2725; see also *id.*, at 211, 99 S.Ct., at 2731 (concurring opinion). Because a consent decree is an agreement that is enforceable in court, it has qualities of both voluntariness and compulsion. The Court has explained that Congress intended to encourage voluntary settlement of Title VII suits, *Carson v. American Brands, Inc.*, 450 U.S. 79, 88, n. 14, 101 S.Ct. 993, 998, n. 14, 67 L.Ed.2d 59 (1981), and cooperative private efforts to eliminate the lingering effects of past discrimination. *Weber*, 443 U.S., at 201–207, 99 S.Ct., at 2726–2729. It is by no means clear, therefore, that the permissible scope of relief available under a consent decree is the same as could be ordered by a court after a finding of liability at trial.

347-348, 364-371, 97 S.Ct. 1843, 1860-1861, 1869-1872, 52 L.Ed.2d 396 (1977). If victimization is shown, however, an individual is entitled to whatever retroactive seniority, backpay, and promotions are consistent with the statute's goal of making the victim whole. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 762-770, 96 S.Ct. 1251, 1263-1266, 47 L.Ed.2d 444 (1976).

In Title VII class-action suits, the Courts of Appeals are unanimously of the view that race-conscious affirmative relief can also be "appropriate" under § 706(g).[10] See *University of California Regents v. Bakke*, 438 U.S. 265, 301-302, 98 S.Ct. 2733, 2753-2754, 57 L.Ed.2d 750 (opinion of POWELL, J.); *id.*, at 353, n. 28, 98 S.Ct., at 2780, n. 28 (1978) (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). The purpose of such relief is not to make whole any particular individual, but rather to remedy the present class-wide effects of past discrimination or to prevent similar discrimination in the future. Because the discrimination sought to be alleviated by race-conscious relief is the class-wide effects of past discrimination, rather than discrimination against identified members of the class, such relief is provided to the class as a whole rather than to its individual members. The relief may take many forms, but in class actions it frequently involves percentages—such as those contained in the 1980 consent decree between the city and respondents—that require race to be taken into account when an employer hires or promotes employees. The distinguishing feature of race-conscious relief is that no individual member of the disadvantaged class has a claim to it, and individual beneficiaries of the relief need not show that they were themselves victims of the discrimination for which the relief was granted.

In the instant case, respondents' request for a preliminary injunction did not include a request for individual awards of retroactive seniority—and, contrary to the implication of the Court's opinion, the District Court did not make any such awards. Rather, the District Court order required the city to conduct its layoffs in a race-conscious manner; specifically, the preliminary injunction prohibited the city from conducting layoffs that would "decrease the percentage of black[s]" in certain job categories. The city remained free to lay off any individual black so long as the percentage of black representation was maintained.

Because these cases arise out of a consent decree, and a trial on the merits has never taken place, it is of course impossible for the Court to know the extent and nature of any past discrimination by the city. For this reason, to the extent that the scope of appropriate relief would depend upon the facts found at trial, it is impossible to determine whether the relief provided by the preliminary injunction would have been appropriate following a trial on the merits. Nevertheless, the Court says that the preliminary injunction was inappropriate because, it concludes, respondents could not have obtained similar relief had their cases been litigated instead of settled by a consent decree.

The Court's conclusion does not follow logically from its own analysis. As the

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[10] See, e.g., *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1027-1028 (CA1 1974), cert. denied, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 629 (CA2 1974); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 174-177 (CA3 1977), cert. denied, 438 U.S. 915, 98 S.Ct. 3145, 57 L.Ed.2d 1161 (1978); *Chisholm v. United States Postal Service*, 665 F.2d 482, 499 (CA4 1981); *United States v. City of Alexandria*, 614 F.2d 1358, 1363-1366 (CA5 1980); *United States v. IBEW, Local No. 38*, 428 F.2d 144 (CA6), cert. denied, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); *United States v. City of Chicago*, 663 F.2d 1354 (CA7 1981) (en banc); *Firefighters Institute v. City of St. Louis*, 616 F.2d 350, 364 (CA8 1980), cert. denied, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981); *United States v. Ironworkers Local 86*, 443 F.2d 544, 553-554 (CA9), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 944 (CA10 1979); *Thompson v. Sawyer*, 219 U.S.App.D.C. 393, 430, 678 F.2d 257, 294 (1982).

Court points out, the consent decree arose out of a Title VII suit brought by respondents alleging, *inter alia*, that the city had engaged in a pattern and practice of discrimination against members of the plaintiff class. Mr. Stotts, the named plaintiff, claimed that he and the class members that he represented had been denied promotions solely because of race, and that because of that discrimination, he and other members of the class had been denied their rightful rank in the Memphis Fire Department. See Complaint of Respondents in No. 82-229, ¶¶ 9 and 10, App. 10. Had respondents' case actually proceeded to trial, therefore, it would have involved the now familiar two-stage procedure established in *Teamsters* and *Franks*. The first stage would have been a trial to determine whether the city had engaged in unlawful discrimination; if so, the case would proceed to the second stage, during which the individual members of the class would have the opportunity to establish that they were victims of discrimination. *Teamsters*, 431 U.S., at 371, 375, 97 S.Ct., at 1874. The Court itself correctly indicates: "If individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster." *Ante*, at 2588. Were respondents to prevail at trial on their claims of discrimination, therefore, they would have been entitled to individual awards of relief, including appropriate retroactive seniority. Thus, even treating the District Court's preliminary injunction as if it granted individual awards of retroactive seniority to class members, it is relief that respondents might have obtained had they gone to trial instead of settling their claims of discrimination. Thus, the Court's conclusion is refuted by its own logic and by the very cases on which it relies to come to its result.[11]

For reasons never explained, the Court's opinion has focused entirely on what respondents have actually shown, instead of what they might have shown had trial ensued. It is improper and unfair to fault respondents for failing to show "that any of the blacks protected from layoff had been a victim of discrimination," *ante*, at 2588, for the simple reason that the claims on which such a showing would have been made never went to trial. The whole point of the consent decree in these cases—and indeed the point of most Title VII consent decrees—is for both parties to avoid the time and expense of litigating the question of liability and identifying the victims of discrimination. In the instant consent decree, the city expressly denied having engaged in any discrimination at all. Nevertheless, the consent decree in this case provided several persons with both promotions and backpay. By definition, all such relief went to persons never determined to be victims of discrimination, and the Court does not indicate that it means to suggest that the original consent decree in these cases was invalid. Any suggestion that a consent decree can provide relief only if a defendant concedes liability would drastically reduce, of course, the incentives for entering into consent decrees. Such a result would be incongruous, given the Court's past statements that "Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88, n. 14,

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[11] The Court's opinion is sufficiently ambiguous to suggest another interpretation. The Court concludes that the preliminary injunction was improper because it gave respondents something they could not have obtained had they proved that "a pattern or practice of discrimination existed." *Ante*, at 2588. It is possible, therefore, that the Court is suggesting that the limit on relief available under a consent decree is that which could be awarded if a plaintiff prevailed in "stage I" of a case but failed to proceed to "stage II" during which the plaintiff seeks to identify actual victims of discrimination. But the Court has failed to provide any support for this odd notion. The rationale underlying its opinion seems to be that the limit of the District Court's remedial power is that which could have been ordered following a trial on the alleged discrimination, not just the first stage of such a trial.

101 S.Ct. 993, 998, n. 14, 67 L.Ed.2d 59 (1981); see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147 (1974).

The Court's reliance on *Teamsters* is mistaken at a more general level as well, because *Teamsters* was concerned with individual relief, whereas these cases are concerned exclusively with classwide, race-conscious relief. *Teamsters* arose out of two pattern-or-practice suits filed by the Government alleging that a union and an employer had discriminated against minorities in hiring truck drivers. Prior to a finding of liability, the Government entered into a consent decree in partial resolution of the suit. In that decree, the defendants agreed to a variety of race-conscious remedial actions, including a requirement that the company hire "one Negro or Spanish-surnamed person for every white person" until a certain percentage of minority representation was achieved. 431 U.S., at 330–331, n. 4, 97 S.Ct., at 1852, n. 4. The decree did not settle the claims of individual class members, however, and allowed the individuals whom the court found to be victims of discrimination to seek whatever retroactive seniority was appropriate under Title VII. *Ibid.*

In *Teamsters*, therefore, all class-wide claims had been settled before the case reached this Court. The case concerned only the problems of determining victims and the nature of appropriate individual relief. *Teamsters* did not consider the nature of appropriate affirmative class relief that would have been available had such relief not been provided in the consent decree between the parties. The issue in the present cases, as posed by the Court, is just the reverse. Respondents have not requested individual awards of seniority, and the preliminary injunction made none. Thus, the issue in these cases is the appropriate scope of classwide relief—an issue not present in *Teamsters* when that case came here. *Teamsters* therefore has little relevance for these cases.

The Court seeks to buttress its reliance on *Teamsters* by stressing on the last sentence of § 706(g). That sentence states that a court cannot order the "hiring, reinstatement, or promotion of an individual as an employee . . . if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than discrimination" in violation of Title VII. The nature of the Court's reliance on that sentence is unclear, however, because the Court states merely that the District Court "ignores" the "policy behind § 706(g)." *Ante*, at 2588, 2590. For several reasons, however, it appears that the Court relies on the policy of § 706(g) only in making a particularized conclusion concerning the relief granted in these cases, rather than a conclusion about the general availability of race-conscious remedies.

In discussing § 706(g), the Court relies on several passages from the legislative history of the Civil Rights Act of 1964 in which individual legislators stated their views that Title VII would not authorize the imposition of remedies based upon race. And while there are indications that many in Congress at the time opposed the use of race-conscious remedies, there is authority that supports a narrower interpretation of § 706(g). Under that interpretation, the last sentence of § 706(g) addresses only the situation in which a plaintiff demonstrates that an employer has engaged in unlawful discrimination, but the employer can show that a particular individual would not have received the job, promotion or reinstatement even in the absence of discrimination because there was also a lawful justification for the action. See *Patterson v. Greenwood School District 50*, 696 F.2d 293, 295 (CA4 1982); *E.E.O.C. v. American Tel. & Tel. Co.*, 556 F.2d 167, 174–177 (CA3 1977), cert. denied, 438 U.S. 915, 98 S.Ct. 3145, 51 L.Ed.2d 1161 (1978); *Day v. Mathews*, 174 U.S.App.D.C. 231, 233, 530 F.2d 1083, 1085 (1976); *King v. Laborers Int'l Union, Local No. 818*, 443 F.2d 273, 278–279 (CA6 1971). See also Brodin, *The Standard of Causation in the Mixed-Mo-*

tive Title VII Action: A Social Policy Perspective, 82 Colum.L.Rev. 292 (1982). The provision, for example, prevents a court from granting relief where an employment decision is based in part upon race, but where the applicant is unqualified for the job for nondiscriminatory reasons. In that sense, the section merely prevents a court from ordering an employer to hire someone unqualified for the job, and has nothing to do with prospective class-wide relief.

Much of the legislative history supports this view. What is now § 706(g) had its origin in § 707(e) of H.R. 7152, 88th Cong., 1st Sess. (1963). That original version prevented a court from granting relief to someone that had been refused employment, denied promotion, or discharged "for cause." The "for cause" provision presumably referred to what an employer must show to establish that a particular individual should not be given relief. That language was amended by replacing "for cause" with "for any reason other than discrimination on account of race, color, religion or national origin," which was the version of the sentence as passed by the House. The author of the original version and the amendment explained that the amendment's only purpose was to specify cause, and to clarify that a court cannot find a violation of the act that is based upon facts other than unlawful discrimination. 110 Cong.Rec. 2567 (1964) (remarks of Rep. Celler). There is no indication whatever that the amendment was intended to broaden its prohibition to include all forms of prospective race-concious relief.

In any event, § 706(g) was amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 107. The legislative history of that amendment strongly supports the view that Congress endorsed the remedial use of race under Title VII. The amendment added language to the first sentence of § 706(g) to make clear the breadth of the remedial authority of the courts. As amended, the first sentence authorizes a court to order "such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back-pay ... *or any other equitable relief as the court deems appropriate*." 42 U.S.C. § 2000e-5(g) (emphasized language added in 1972).

In addition, during consideration of the amendment, Congress specifically rejected an attempt to amend Title VII to *prohibit* the use of prospective race-conscious employment goals to remedy discrimination. Senator Ervin proposed an amendment to Title VII intended to prohibit government agencies from requiring employers to adopt goals or quotas for the hiring of minorities. 118 Cong.Rec. 1663-1664 (1972). Senator Javits led the debate against the amendment. *Id.*, at 1664-1676. Significantly, Senator Javits stressed that the amendment would affect not only the activities of federal agencies, but also the scope of judicial remedies available under Title VII. He referred repeatedly to court decisions ordering race-conscious remedies, and asked that two such decisions be printed in the Congressional Record. *Id.*, at 1665-1675.[12] He stated explicitly his view that "[w]hat this amendment seeks to do is to undo ... those court decisions." *Id.*, at 1665. The amendment was rejected by a 2 to 1 margin. *Id.*, at 1676.

With clear knowledge, therefore, of courts' use of race-conscious remedies to correct patterns of discrimination, the 1972 Congress rejected an attempt to amend Title VII to prohibit such remedies. In fact, the Conference Committee stated: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 Cong.Rec. 7166 (1972). Relying on this legislative history of the 1972 amendment and other actions by the Executive and the courts, four members of this Court, including the author of today's opinion, stated in *University of California Regents v. Bakke*, 438 U.S. 265, 353, n. 28, 98 S.Ct. 2733, 2780, n. 28, 57 L.Ed.2d 750: "Executive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race" (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). As has been observed, *supra*, n. 10, moreover, the Courts of Appeals are unanimously of the view that race-conscious remedies are not prohibited by Title VII. Because the Court's opinion does not even acknowledge this consensus, it seems clear that the Court's conclusion that the District Court "ignored the policy" of § 706(g) is a statement that the race-conscious relief ordered in these cases was broader than necessary, not that race-conscious relief is never appropriate under Title VII.

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[12] The two cases placed in the Congressional Record were *United States v. Ironworkers Local 86*, 443 F.2d 544 (CA9), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971) (a percentage goal for black participation in apprenticeship program as part of remedy for Title VII violation), and *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (CA3), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971) (upheld lawfulness of a plan requiring contractors on federally assisted projects to adopt goals for minority employment). Senator Javits also noted the Justice Department's practice of seeking consent decrees in Title VII cases containing percentage hiring goals. 118 Cong.Rec. 1675 (1972).

IV

By dissenting, I do not mean glibly to suggest that the District Court's preliminary injunction necessarily was correct. Because it seems that the affected whites have no contractual rights that were breached by the city's modified layoff plan, the effect of the preliminary injunction was to shift the pain of the city's fiscal crisis onto innocent employees. This Court has recognized before the difficulty of reconciling competing claims of innocent employees who themselves are neither the perpetrators of discrimination nor the victims of it. "'In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a court must draw on the 'qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'" *Teamsters*, 431 U.S., at 375, 97 S.Ct., at 1874, quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329–330, 64 S.Ct. 587, 591–592, 88 L.Ed. 754 (1944). If the District Court's preliminary injunction was proper, it was because it correctly interpreted the original intent of the parties to the consent decree, and equitably enforced that intent in what admittedly was a zero-sum situation. If it was wrong, it was because it improperly interpreted the consent decree, or because a less painful way of reconciling the competing equities was within the court's power. In either case, the District Court's preliminary injunction terminated many months ago, and I regret the Court's insistence upon unnecessarily reviving a past controversy.

Significance of the *Stotts* Decision

The *Stotts* case did not involve a court-ordered hiring or promotional quota based on race or gender. Nor did the case involve other court-ordered relief for nonvictims of an employer's discrimination at the expense of innocent third parties in the context of hiring or promotions. The Court's decision, however, which is based on its interpretation of *both* section 703(h) and section 706(g) of Title VII, forbids the use of such court-ordered preferential techniques in hiring or promotions in a Title VII case. The clear import of *Stotts* is that, under Title VII, the only relief courts may provide for individuals or classes of individuals is make-whole relief for victims of an employer's illegal discrimination. A court may not, by consent decree or judgment after trial, order preferential treatment of nonvictims of an employer's discrimination, whether by imposing a quota or any other means, at the expense of innocent third parties in any part of the employment relationship.

Scope of Consent Decrees

An important preliminary skirmish in the case was resolved in footnote nine of Justice White's opinion. There, the Court made clear that a consent decree purportedly aimed at enforcing a statute cannot exceed the scope of relief available under the statute. A "District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce, not from the parties' consent to the decree." 104 S.Ct. at 2587 n.9 (citation omitted). Had this matter been resolved in a contrary fashion, i.e., that relief in a consent decree need not be delimited by the relief available under the statute the decree is designed to enforce, the significance of *Stotts* would have been reduced. Such a contrary result would permit parties who agreed to preferential relief for nonvictims of the employer's discrimination—unlike the parties in *Stotts*—to obtain the imprimatur of a court on their consent decree, even though the court could not order the same preferential relief if the parties were in dispute.

Although Justice White does refer to a court's lack of authority to enter a "disputed" modification of a consent decree if the decree is inconsistent with the statute, his discussion, taken as a whole, clearly means that a court cannot enter *any* consent decree inconsistent with Title VII. His reference to the disputed nature of the modification is descriptive of the facts before him, rather than a pronouncement permitting a court to enter mutually agreed-upon consent decrees even when they conflict with the statute.

Layoffs, Seniority and Merit Systems, and Preferential Relief

This case involved layoffs of more senior employees in favor of less senior employees on the basis of race, in derogation of an employer's bona fide seniority system. These racially preferential layoffs were undertaken to preserve the percentage of black employees in the work force.[1] That percentage of black employees undoubtedly resulted, at least in part, from the implementation of an earlier Title VII consent decree. The Supreme Court struck down this racially preferential layoff scheme because it violated both section 703(h) and the policy underlying section 706(g). Court orders that currently provide for racially preferential layoffs in favor of nonvictims of an employer's illegal discrimination are now legally infirm and will be challenged.[2]

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[1] The district court's injunction did not require anyone to be laid off. It required that the city's seniority policy not be used in a manner that would reduce the percentage of blacks in the work

Moreover, section 703(h) protects bona fide merit systems as well as bona fide seniority systems. Further, even if the city in *Stotts* had sought to comply with the lower court's injunction by reducing every firefighter's workweek in order both to retain the percentage of minority firefighters and to avoid laying off anyone, it is clear under *Stotts* that the lower court's injunction still would be invalid as conflicting with Title VII. That is, *any* court-ordered racial or gender preference in favor of a nonvictim of an employer's illegal discrimination at the expense of an innocent third party in derogation of a bona fide seniority or merit system under Title VII is impermissible under *Stotts*. This flows from the Court's interpretation of sections 703(h) and 706(g). Thus, even had the Memphis Fire Department required a nonvictim of its discrimination to suffer a loss less onerous than a layoff, such as a reduced workweek, in order to preserve the racial composition of its work force as a remedy to alleged discrimination, the *Stotts* decision would bar such action.

It is also worth noting that an employer who is not currently utilizing a seniority system or merit system is just as free after the *Stotts* decision to install either system as he or she was before *Stotts*.

Stotts' Effect on Judicial Relief in Hiring and Promotion

Although the facts of this case did not involve preferential treatment on the basis of gender or race in hiring or promotions, as mentioned earlier, the Court's decision relied on both section 703(h) and section 706(g).[3] In premising its decision in part on section 706(g), the Court has profoundly affected the judicial relief available under Title VII in hiring and promotions, as well as in layoffs.

Section 706(g), as the Court acknowledged, is the basis for a court's remedial authority in Title VII litigation.[4] That authority encompasses remedial action pertaining to hiring and promotions. The last sentence of the section, which expressly limits this remedial power, specifically mentions hiring and promotion of individuals:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of §704(a) of this title. 42 U.S.C. §2000e–5(g) (1982).

Accordingly, when the Supreme Court interprets section 706(g) as "provid[ing] make-whole relief only to those who have been actual victims of illegal discrimination" in the context of a layoff, the significance of that interpretation in the layoff context cannot logically be separated from its significance with respect to hiring and promotions.

Indeed, the Court's heavy reliance on the legislative history of Title VII clearly demonstrates the relevance of the Court's opinion to the scope of a Federal court's

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force. Following entry of the injunction, the city undertook race-conscious layoffs in order to maintain the racial composition of its work force.

[2] Indeed, the Department of Justice and seperate private parties have successfully sought to overturn lower court orders providing for racially preferential layoffs of public employees in Cincinatti and Newark. Both orders have been vacated, following *Stotts*, by the Federal district courts that originally entered them. *See* Vulcan Pioneers, Inc. v. New Jersey Dep't of Civil Serv. (June 26, 1984) and United States v. City of Cincinatti (July 3, 1984).

[3] The Court repeatedly rested its decision in this case on both provisions. *E.g.*, Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576, 2587 n.9, 2590 and n.17. Indeed, these citations make reasonably clear that the Supreme Court found it necessary to address the scope of a court's remedial power under Title VII because of its understanding that the minority firefighters might have prevailed in this case even in the face of a bona fide seniority system if they were being provided make-whole relief as "proven" victims of discrimination. That is, the Court may have permitted the minority firefighters to be "slotted" into the bona fide seniority system ahead of incumbent employees, as in *Teamsters* and *Franks* (Teamsters v. United States, 431 U.S. 324 (1979); Franks v. Bowman Transportation Co., 424 U.S. 947 (1976)), to remedy the employer's discrimination against them. Whether the Court would permit such make-whole relief for actual victims if it would cause other employees to be laid off is an issue the Court did not resolve. It appears, however, that the Court looks with disfavor on a make-whole remedy with such an effect. 104 S.Ct. at 2588 and n.11. The Court's discussion of section 706(g), set forth, not in cursory fashion, but in detail over several pages as an integral part of its opinion, is no mere surplusage. *See* especially 104 S.Ct. at 2587 n.9.

[4] 104 S.Ct. at 2588–89.

Title VII remedial authority in the context of hiring and promotions. The Court's discussion of, and citations to, the legislative history of section 706(g) make clear that its interpretation that a court can only award make-whole relief to actual victims of an employer's illegal discrimination is of general applicability.[5] The Court quoted at length the 1964 legislative history of Title VII, which explains that a court's remedial authority under section 706(g) extends only to affording relief for actual victims of discrimination in hiring and other phases of the employment relationship. The majority opinion quoted portions of the legislative history, for example, that specifically disclaim any authority for a court to enter an order requiring quotas.

In one such citation, the Court made prominent use of remarks by Senator Humphrey in explaining a court's authority under section 706(g). 110 Cong. Rec. 6549 (1964). The Court quoted only part of one passage from Senator Humphrey's remarks. The passage in full follows; those portions that the Court left out have been emphasized: "Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require *hiring*, firing, *or promotion* of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but is nonexistent." *Id.* This full quote, of course, is cumulative in light of other extensive citations to the legislative history. It further indicates, however, that the Court's interpretation of judicial authority to provide a remedy for individuals or classes of individuals as extending only to the granting of make-whole relief to actual victims is applicable not only when "firing" (or laying off) employees is at issue, but also when hiring and promotions are at issue. Clearly, the Court could hardly attach interpretive significance to one word in one clause of its quote from Senator Humphrey while distinguishing the significance of the rest of the same clause that it chose not to cite for the purpose of resolving the layoff case actually before it.

The Court also cited passages from the legislative history of the 1972 amendments to Title VII and its earlier opinions in *Teamsters v. United States*[6] and *Franks v. Bowman Transportation Co.*[7] in support of its conclusion that the only relief section 706(g) affords to individuals or classes of individuals is make-whole relief to actual victims of an employer's illegal discrimination.[8] The reference to the legislative history of the 1972 amendments is particularly striking. Advocates of a court's authority to provide relief for nonvictims have frequently cited the language added to Title VII in 1972 and its legislative history as ratifying such judicial authority.[9] The Court dismissed this argument—the linchpin of the case for preferential relief under section 706(g)—in a footnote. 104 S.Ct. at 2590 n.15.

It might be argued that, since the Court did not invalidate the underlying consent decree creating the race-conscious hiring and promotion relief, the Court's ruling has no import for Title VII relief in the context of hiring and promotion. The validity of the underlying consent decree, however, was not at issue in the case. Rather, the Court was faced with an injunction that was creating the harm complained of in the case, i.e., layoffs. The failure of the Court to rule that the underlying consent decree is illegal, then, in no way undermines the impact of *Stotts* in the hiring and promotion contexts.

It also might be argued that *Stotts* addresses only retrospective "make-whole" relief, which is necessarily limited to victims, and does not limit prospective race-conscious class relief aimed at remedying the purported classwide effects of the employer's prior discrimination. Accordingly, this argument holds that *Stotts* affects only seniority and layoff situations, but not situations involving hiring and promotion. This argument is bolstered by two observations. First, the majority opinion made no reference to earlier cases from virtually every appellate court upholding race-conscious remedies for nonvictims under Title VII. Thus, it might be said, it would be unusual for the Court to overturn the virtually unanimous view of the appellate courts without making a reference to those decisions. Second, the last sentence of section 706(g) can be interpreted merely to mean that, even if an employer has discriminated, a particular individual is not entitled to a job, promotion, or reinstatement if he or she would not have received such job, promotion, or reinstatement even in the absence of the employer's discrimination.

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[5] Of course, actual victims of an employer's discrimination can include nonapplicants for a job or promotion who can meet "the not always easy burden of proving that he would have applied for the job had it not been for those [discriminatory] practices." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 368 (1977). When the nonapplicant meets this burden, he or she is in a position similar to that of an applicant. *Id.*

[6] 431 U.S. 324 (1979).

[7] 424 U.S. 947 (1976).

[8] It should be stressed that the bar against preferential relief is equally applicable to a court's entry of a consent decree or a judgment after trial. 104 S.Ct. at 2587 n.9.

[9] *See* EEOC v. A.T&T., 556 F.2d 167, 177 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); United States v. Int'l Union of Elevator Constructors, 538 F.2d 1012, 1019–20 (3d Cir. 1976); Patterson v. American Tobacco Co., 535 F.2d 257, 267 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1027–28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

These arguments, however, are an unpersuasive effort to limit the meaning of the Court's decision: (1) they were all raised by three Justices—in Justice Blackmun's dissenting opinion; the majority clearly was not persuaded by them; (2) moreover, the majority opinion is quite clear and unambiguous, as previously noted, in its interpretation of section 706(g) as extending individual or class relief only to victims of an employer's discrimination. In short, the rationale of the Court's decision clearly renders preferential relief for nonvictims of an employer's discrimination under Title VII impermissible in *all* employment contexts and not just layoffs.

What the *Stotts* Decision Does Not Do

The *Stotts* decision affects only a court's remedial authority under Title VII. *Stotts* does not disturb in any fashion the use of both an "intent" test and an "effects" test in Title VII litigation, and the established burdens of proof under both tests remain unchanged. Class action and "pattern and practice" lawsuits on behalf of classes of actual victims of an employer's illegal discrimination remain available. Of course, courts may still enjoin the use of discriminatory employment practices, in addition to making actual victims whole. Further, courts still have authority to order nondiscriminatory affirmative action remedies such as increased recruiting, training, counseling, and education programs. After *Stotts*, however, a court lacks authority under Title VII to approve a consent decree or to order relief in favor of nonvictims of an employer's illegal discrimination at the expense of innocent third parties, whether in the hiring, promotion, layoff, or other context.[10]

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[10] The constitutionality of a public employer's *voluntarily* engaging in preferential treatment in employment, such as the use of quotas at issue in the Detroit Police Department case (*Bratton v. City of Detroit*), remains unsettled at the Supreme Court level. Although the Court denied *certiorari* in *Bratton*, it has long been recognized that a denial of *certiorari* by the Supreme Court does not speak to the merits. Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 365 n.1 (1973); Brown v. Allen, 344 U.S. 443, 492 (1953) (Frankfurter, J., in an opinion on this issue expressing the view of a majority of the Court, 344 U.S. at 452); United States v. Carver, 260 U.S. 482, 490 (1923).

The Supreme Court also has not ruled on whether a court may order race-conscious remedies preferring nonvictims of an employer's discrimination in an employment discrimination case brought under the equal protection clause of the 14th amendment or the equal protection component of the due process clause of the 5th amendment. Moreover, the Supreme Court has not addressed this issue under 42 U.S.C. §§1981 or 1983. 42 U.S.C. §1981 provides:

> All persons within the United States shall have the same right to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1983 provides that "[e]very person who, under color of [law] subjects, or causes to be subjected, any citizen or other person to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured."

The Court has established, however, that section 1981 reaches only purposeful discrimination and not practices that "merely result in a disproportionate impact on a particular class." Gen. Bldg. Contractors Assoc. v. Pennsylvania, 458 U.S. 375, 382-91 (1982). The Court similarly has concluded, with respect to section 1983 actions, that a plaintiff must show an intent to discriminate in order to establish a violation. *See* Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576, 2590 n.16. The courts do have various remedies available in section 1981 and section 1983 cases, including compensatory damages, backpay, reinstatement, and other forms of injunctive relief. As mentioned earlier, whether remedies under these two statutes, which are triggered only in a case of intentional discrimination, may extend to preferential relief on the basis of race or gender at the expense of innocent third parties in employment discrimination cases has not been determined by the Supreme Court.

An Exchange of Opinion on the *Stotts* Decision

Forum© THE NEW YORK TIMES, SUNDAY, JULY 1, 1984

SENIORITY, MINORITIES AND THE SUPREME COURT

Memphis Did Not Kill Affirmative Action

By DOUGLAS F. SEAVER

LAST month, the Supreme Court rendered one its most important decisions on discrimination law since the Civil Rights Act of 1964. The Court, with a six-to-three majority, ruled that the terms of a bona fide seniority system take precedence over an affirmative action plan when layoffs are involved. The court's decision cleared the way for the City of Memphis to dismiss firefighters on a last-hired, first-fired basis, which would disparately impact minority firefighters, even though the City had signed a consent decree in an earlier class action discrimination case agreeing to percentage goals for black hires and promotions.

Many civil rights leaders have condemned the decision as the death knell for affirmative action. A close analysis of the case, however, suggests such dire conclusions may be premature. Nevertheless, the decision means minorities and women will have to be much more careful about the terms of their employment contracts.

Initially, a class action was begun in the United States District Court for the Western District of Tennessee in 1977 by Carl Stotts, a black firefighter captain. He charged that the Memphis Fire Department and other city officials were discriminating against blacks in hirings and promotions. Before the case reached trial, the parties negotiated a consent decree that established percentage goals for hiring and promoting blacks. The consent decree, however, made no provision for layoffs or reductions in rank or the award of competitive seniority to black firefighters. Furthermore, the firefighters union, which had a collective bargaining agreement with the City of Memphis, was not made a party to the consent decree.

When the City of Memphis announced proposed layoffs in May 1981 based on the last-hired, first-fired provisions of the union contract, the black firefighters were quick to respond. They brought a motion for a preliminary injunction preventing layoffs on a seniority basis, contending that any seniority-based layoff would violate the affirmative action provisions of the consent decree. The District Court's order granting such an injunction was the subject of the Supreme Court's review.

The Supreme Court held that the central issue in the case was whether the district court exceeded its powers in entering the injunction requiring white employees to be laid off when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority. The high Court reasoned that it was inappropriate to affirm the injunction on a contract theory because the consent decree never addressed the issue of reductions in force or the application of the seniority system. Furthermore, since neither the union nor the non-minority employees were parties to the suit when the 1980 decree was entered, the decree could not be held to indicate any agreement by them to any of its terms.

The Supreme Court went on to hold that Section 703(h) of Title VII permits the routine application of a seniority system absent proof of an intention to discriminate, and the seniority provisions of the union contract were enforceable where there was no evidence by members of plaintiff's class that they had been actual victims of a discriminatory practice and should be awarded competitive seniority.

The short-term effects of the decision are clear — in the settlement of any race or sex discrimination case involving union hiring or promotions, employees must seek the union's participation in the negotiation of any consent decree, must include the seniority system as a subject of negotiation, and should obtain where possible the award of competitive seniority to specifically identified victims of discrimination. Where defendants are unwilling to award retroactive seniority in settlements — possibly in fear of reverse discrimination claims by white union employees — plaintiffs will have to try their case in order to obtain rulings that they were subject to discrimination and deserved retroactive seniority.

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UNION leaders in future bargaining sessions will be caught in a very delicate position. Female and minority union members will demand that affirmative action goals be tied to layoffs and that current seniority provisions be modified. Such changes, however, would impact negatively on the unions' largest constituency — white male workers — and will be the subject of fierce debate.

It must be remembered that the seniority exemption to Title VII is a principle of statutory law — and as such can be amended by Congress. Once civil rights leaders have had an opportunity to review the Supreme Court decision, they may bring strong pressure on Congress to amend Title VII.

Where union or nonunion employers have not adopted seniority systems in the past, they will find it difficult to do so in the future. An employer who has relied on a merit system for making promotion and termination decisions will have to articulate important, objective business considerations for adopting the more arbitrary and discriminatory seniority system. It is expected that courts and agencies with the responsibility for enforcing Title VII will review with suspicion any employer who jettisons the merit system in favor of a seniority system for layoffs.

Many experts in discrimination law believe that the affirmative action programs adopted in the late 1960's and during the 1970's are sufficiently old now that most female and minority employees have accrued sufficient seniority to give them appropriate protection during any layoffs. Even if many female and minority employees have some protection, the court's decision makes it clear that employees must identify any discrimination in hiring or promotion early and bring suit for a determination of their seniority rights.

Perhaps the greatest impact of the court's decision will be the attitude of the Reagan Administration regarding affirmative action. No sooner had the Supreme Court's decision been issued than William Bradford Reynolds, head of the Justice Department's Civil Rights division, announced that he would order the review and assess the validity of hundreds of court-ordered affirmative action programs where the courts had employed racial quotas and goals in hiring to effectuate appropriate relief.

Mr. Reynolds has adopted a broad interpretation of the court's decision, publicly stating that the decision went beyond seniority questions to rule out all court-mandated preferential treatment of minorities and women in employment. This interpretation seems overly broad. However, it is clear that plaintiffs and the courts will have to be careful to distinguish the court's ruling in the Memphis Fire Department case in seeking and formulating remedies in future class discrimination cases.

Those who have been the past beneficiaries of court-ordered affirmative action are left to wait for Mr. Reynolds' next shoe to drop. ■

THE NEW YORK TIMES, SUNDAY, JULY 29, 1984

LETTERS

Affirmative

To the Editor:

In considering the impact of the Supreme Court's *Memphis* decision on affirmative action ("Memphis Did Not Kill Affirmative Action," Business Forum, July 1), one must first carefully define the term.

If one defines affirmative action in what Morris Abram, Vice Chairman of the United States Commission on Civil Rights, calls its "original and undefiled meaning," then the *Memphis* decision has no impact on affirmative action. Affirmative action in its original sense means increased recruiting, training, counseling and educational opportunities, targeted to minorities and women, but open to all. This nondiscriminatory affirmative action is aimed at breaking down the "old-boy" network in hiring and promotions and providing for equal employment opportunity without regard to race or gender and without contracting such opportunity for anyone else.

Preferential affirmative action seeks to reward persons for membership in a group, even if an employer did not discriminate against those persons, at the expense of innocent individuals. The *Memphis* decision deals a sharp blow to this discriminatory form of affirmative action.

The writer, Douglas F. Seaver, suggests that "where union or nonunion employees have not adopted seniority systems in the past, they will find it difficult to do so in the future." I do not believe this will be the case. As he notes, Section 703(h) of Title VII protects an employer's use of a bona fide seniority system (as well as a bona fide merit system) which is neither adopted nor applied with an intent to discriminate on the basis of race or gender.

Indeed, the Supreme Court permitted such a seniority system to govern the order of layoffs in *Memphis*, notwithstanding an adverse impact on minority firefighters. Given the central role seniority plays in the workforce, its traditional importance to unions, and Title VII's express protection of seniority, there is no reason to expect "that courts and agencies with the responsibility for enforcing Title VII will review with suspicion any employer who jettisons the merit system in favor of a seniority system for layoffs." Employers are just as free to adopt a bona fide seniority system today as they were prior to the *Memphis* ruling, notwithstanding the adverse impact such a system may have on monorities in the layoff context — so long as the employer neither adopts nor applies such a system with an intent to discriminate.

The *Memphis* case did not involve hiring or promotions. But the Court, in reaching its result with respect to layoffs, made a crucial interpretation of Section 706(g) of Title VII. The Court repeatedly rests its decision in this case on both Section 703(h) *and* Section 706(g).

Section 706(g) is the basis for a court's remedial authority *generally* under Title VII, including the authority to order affirmative action and equitable relief, as the Court acknowledged in *Memphis*. That remedial authority encompasses hiring and promotions.

Accordingly, when the Supreme Court interprets Section 706(g) as "provid[ing] make-whole relief only to those who have been actual victims of illegal discrimination," one cannot logically separate the import of that interpretation in the layoff context of *Memphis* from its import with respect to hiring and promotions.

Indeed, the Court's heavy reliance on the legislative history of Title VII clearly demonstrates the relevance of the Court's opinion to the scope of a Federal court's Title VII remedial authority in the context of hiring and promotions. The Court's discussion of, and citations to, the legislative history of Section 706(g) makes clear that its interpretation that a court can only award make-whole relief to actual victims of an employer's illegal discrimination is of general applicability. The majority opinion quoted portions of the legislative history that specifically disclaimed any authority on the part of a court to enter an order requiring quotas.

The Court, for example, cited remarks of the principal Senate sponsors: "[u]nder Title VII, not even a Court, much less the [Equal Employment Opportunity] Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title. . . ." House Republican sponsors made similar remarks. The Court also quoted Senator Humphrey as stating: "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of [Section 706(g)]."

Thus, there is much reason to believe that court-ordered preferential treatment on the basis of race or gender in favor of non-victims of an employer's illegal discrimination and at the expense of innocent persons — such as quotas — are as impermissible under Title VII in hiring and promotions as they are in layoffs. This is a vindication of individual rights and a victory for the cause of civil rights for all.

MARK R. DISLER
General Counsel
U.S. Commission on Civil Rights
Washington, July 24

Statement of the United States Commission on Civil Rights Concerning the Detroit Police Department's Racial Promotion Quota

January 17, 1984*

The U.S. Commission on Civil Rights commends the city of Detroit for its desire to eradicate racial discrimination in its police department's employment practices and to increase the number of blacks in its police force. However, the Commission deplores the city's use of a racial quota in its promotion of sergeants to lieutenants as one of the methods for achieving its laudable objectives.

The courts examining the validity of the promotion quota concluded that the Detroit Police Department (DPD) engaged in pervasive discrimination against blacks from at least 1943 to the 1970s in all phases of its operations, including the hiring and promotion of employees, job assignments, and the treatment of black citizens. In July 1974 the city voluntarily adopted an affirmative action plan. One of the elements of the plan alters the method whereby sergeants are promoted to lieutenants. Prior to 1974, candidates for promotion who scored a minimum of 70 on a written test were ranked on a single list. Each candidate was accorded a numerical rating based upon a number of factors, including their score on the written examination, length of service, performance or service ratings determined by supervisors, degree of college education or credits, veterans' points, and an oral interview. Promotions were given to the highest ranking candidates on the list in numerical order until all available positions were filled.

The affirmative action plan does not change the basic criteria for determining which sergeants receive promotions to lieutenant. The plan, however, requires that two separate lists be compiled—one for black sergeants and the other for white sergeants. Rank on both lists is determined by use of the same numerical rating system in effect prior to 1974. Promotions are made alternately from each list so that one black officer is promoted for each white officer until 50 percent of the lieutenant corps is black, an event not expected to occur until 1990. Pursuant to the plan, a number of black sergeants have been promoted instead of white sergeants who would have ranked ahead of them if a single list had been used. The Supreme Court decided last week not to hear the case *(Bratton* v. *City of Detroit)*.

The DPD's promotion quota is factually similar to one currently at issue in the case involving the New Orleans Police Department *(Williams* v. *City of New Orleans)*, pending before the full U.S. Court of

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* The Commission adopted the statement concerning the Detroit Police Department's racial promotion quota on January 17, 1984, by a 6–2 vote. Commissioners Mary Frances Berry and Blandina Cardenas Ramirez dissented.

Appeals for the Fifth Circuit. It differs from the Memphis Fire Department case now before the Supreme Court. The Memphis case involves seniority-based layoffs that would reduce the prelayoff percentage of black employees, a number of whom were hired and promoted following the city of Memphis' earlier agreement to two consent decrees.

In the Commission's view, enforcement of nondiscrimination law in employment must provide that all of an employer's discriminatory practices cease and that any identifiable individual who has been the direct victim of discrimination be returned to the place he or she would have had in the work force in the absence of the employer's discrimination. Thus, each identifiable victim of the employer's discriminatory employment practices should be made whole, including the provision of backpay and restoration to his or her rightful place in the employer's work force at the next available opening. Such relief should also, when appropriate, accord a seniority status to the victim of discrimination higher than that of an innocent employee who would have been junior to the victim of discrimination in the absence of their employer's discrimination (here the innocent third party properly must share the burden of his or her employer's discrimination against identifiable victims in order to afford an adequate remedy to those victims). These kinds of relief, of course, must be available in cases involving a whole class of actual victims of discrimination, as well as cases involving only one such victim.

In addition, the use of affirmative action techniques, as tools to enhance equal opportunity for *all* citizens rather than as devices to penalize some on account of their nonpreferred racial, gender, or other status, should also be required of employers found to have discriminated, and encouraged for all employers who wish to improve the quality of their work force. These techniques include: (1) additional recruiting efforts, aimed at increasing the number of qualified minority (or female) applicants from which the employer undertakes nondiscriminatory, race- and gender-neutral hiring, (2) training, educational, and counseling programs for applicants and employees, targeted to attract minority (or female) participants and to enhance their opportunities to be hired or promoted on the basis of merit (rather than race or gender), but open to all on an equal basis.

"Simple justice" is not served, however, by preferring nonvictims of an employer's discrimination over innocent third parties solely on account of their race in any affirmative action plan. Such racial preferences merely constitute another form of unjustified discrimination, create a new class of victims, and when used in public employment, offend the constitutional principle of equal protection of the law for all citizens. The DPD's promotion quota benefits nonvictims as well as victims of past illegal discrimination in promotions in derogation of the rights of innocent third parties, solely because of their race. Accordingly, it is a device that should be eschewed, not countenanced.

The Commission believes that the use of racially preferential employment techniques, such as quotas, is not properly viewed as a situation pitting the interests of blacks against the interests of whites. Rather, each specific preferential plan favors members of the preferred group—of whatever race or gender—at the expense of the nonpreferred group, which inevitably includes persons of diverse ethnic, religious, or racial groups, and sometimes includes females. Members of these groups have often been subject to past discrimination. Thus, in the New Orleans Police Department case, separate groups of Hispanic and female police officers, in addition to a group of white officers, intervened to object to the promotion quota favoring black males.

The Commission also rejects an "operational needs" justification for racial quotas, as Detroit advanced in favor of its promotion quota. The city asserts that it needs to increase black police officers at all ranks, in order to achieve more effective law enforcement and reduce discriminatory treatment against black citizens, and that the promotion quota was a necessary means of meeting those objectives. This justification amounts to little more than a claim that only black police officers can effectively provide law enforcement services to black citizens or supervise lower ranking black police officers. Such a claim has no place in a free, pluralistic society made up of many diverse ethnic and racial groups striving to achieve fully the goal of becoming one nation. If accepted, it would justify a claim that members of a racial or ethnic group can be properly served or treated only by fellow members of that group, e.g., only black teachers can teach black children—or that only white teachers can teach white children. This claim would, in the words of Chief Justice Earl Warren, "turn the clock back" (*Brown v. Board of Education* (1954)) to the "separate but equal" days of the past, when public entities dispensed benefits, entitlements, and penalties of all kinds on the basis of a person's skin color. Such a claim, in short, would ultimately divide the Nation rather than unite it.

The alternatives to racially preferential employment policies that a police department can use to meet its needs for more effective, and nondiscriminatory, law enforcement include: (1) vigorous enforcement of policies of nondiscriminatory treatment of all citizens by its members, including the disciplining or dismissal of offending officers, and (2) provision of training and counseling programs for its officers to instruct and counsel them in the requirements of nondiscriminatory law enforcement.

Nearly 25 years ago, Arthur L. Johnson, executive secretary of the Detroit branch of the National Association for the Advancement of Colored People, testified about the poor relations between black citizens and the DPD before this Commission's predecessor. He said, in part, "At absolutely no point in their experience do Negroes in Detroit see the law enforcement agency as being truly color-blind . . . ."

Unfortunately, the DPD's use of racial quotas demonstrates that it is still not truly colorblind, at least with respect to its employment practices.

Because the issues in the Detroit case are of such importance, the Commission is disappointed that the Supreme Court has declined to hear the case. The issue of racial quotas in promotions, as well as in hiring, will undoubtedly be presented for Supreme Court review in the future. The Commission hopes the Court will resolve the issue by reaffirming the principle of nondiscrimination and forbidding preferential treatment based on race, color, gender, national origin, or religion in favor of nonvictims of discrimination at the expense of innocent individuals.

Statement of the United States Commission on Civil Rights Concerning *Firefighters* v. *Stotts*

July 17, 1984*

The U.S. Commission on Civil Rights applauds the decision of the Supreme Court in *Firefighters* v. *Stotts* (June 12, 1984)—the Memphis layoff case. Contained in the Court's opinion on section 706(g) of Title VII and in the legislative history of the 1964 Civil Rights Act is a reaffirmation of the principle that race and gender are not proper bases to reward or penalize any person. The decision retains the strong relief available for actual victims of an employer's illegal discrimination, including entire classes of such victims. Moreover, it leaves intact nondiscriminatory affirmative action methods favored by the Commission such as increased recruiting, training, counseling, and educational programs. It properly denies a court, however, the authority under Title VII to use discrimination in order to remedy discrimination.

In the decision, the Supreme Court held that, under Title VII, an employer may lawfully apply bona fide seniority rules to govern the sequence of employee layoffs rather than forego the use of such rules in order to preserve the percentage of racial minorities in the work force when those minorities were not the actual victims of the employer's illegal discrimination.

In so holding, the Supreme Court also stated that a court can order make-whole relief under Title VII only for *actual* victims of an employer's illegal discrimination. The Court, then, not only preserved the validity of bona fide seniority systems, but also vindicated the important general principle that rights inhere in individuals, not in groups. The Court's pronouncement in *Stotts* is fully consistent with Commission policy that make-whole relief to actual victims and nondiscriminatory affirmative action are the proper remedies under Title VII and that "preferring nonvictims of an employer's discrimination over innocent third parties solely on account of their race [or gender is inappropriate] in any affirmative action plan." *(Statement of the United States Commission on Civil Rights Concerning the Detroit Police Department's Racial Promotion Quota,* January 17, 1984.)

In *Stotts,* black firefighters sued the Memphis, Tennessee, Fire Department and other city officials under Title VII and other statutes alleging a pattern and practice of racial discrimination in the fire department's hiring and promotion decisions. The city agreed to a consent decree in 1980 providing, among other relief, hiring and promotional goals. The city did not admit that it had discriminated against anyone. Under an earlier, similar consent decree applicable citywide, the percentage of black employees in the fire department increased from approximately 4 percent to 11½ percent in 1980.

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* On July 11, 1984, the Commission adopted two statements. The statement on *Firefighters* v. *Stotts* was adopted by a 4–2 vote, with Commissioners Pendleton, Abram, Bunzel, and Destro in favor and Commissioners Berry and Ramirez opposed. The *Hishon* v. *King and Spalding* statement was adopted by a 4–0 vote, with Commissioners Pendleton, Abram, Bunzel, and Destro in favor. Commissioners Berry and Ramirez supported the Court's decision but declined to vote. Commissioners Guess and Buckley did not attend the meeting and did not vote.

In May 1981 a budget deficit led the city to seek to lay off some of its firefighters. The city sought to conduct the layoff according to its seniority rules, which were also part of an agreement it had with the Firefighters Union.

The black plaintiffs obtained a court order enjoining the city's use of its seniority rules in a manner that would reduce the percentage of black firefighters then employed in the fire department.

Thereafter, the city laid off some white firefighters with greater seniority than some black firefighters who were retained in the work force—in derogation of the city's seniority policy.

The U.S. Court of Appeals for the Sixth Circuit affirmed the lower court's entry of the injunction. The Supreme Court reversed the appellate court's decision.

In holding that the city may apply its seniority rules despite their adverse impact on less senior black firefighters, the Supreme Court relied, in part, on section 703(h) of Title VII, which specifically protects an employer's bona fide seniority system.[1] Under the Court's holding, an employer need not disregard its bona fide seniority policy and lay off, on the basis of race, more senior employees in order to preserve the jobs of less senior employees who were not actual victims of an employer's discrimination.

Indeed, as the Supreme Court's description of its earlier decision in *Teamsters* v. *United States* makes clear, a court may only provide competitive seniority to actual victims of an employer's illegal discrimination under Title VII, even where, as in *Teamsters*, layoffs were not at issue.

In determining that a court's remedial authority under Title VII extends only to actual victims of an employer's illegal discrimination, the Court interpreted section 706(g) of Title VII.[2] Section 706(g) governs a court's remedial authority generally under Title VII. The Court stated that the last sentence of this provision limited a court's remedial authority as reaching only actual victims of an employer's illegal discrimination.

In coming to this conclusion, the Court relied extensively on Title VII's 1964 legislative history and also relied on the legislative history of the 1972 amendments to Title VII. For example, the Supreme Court cited Senator Humphrey's 1964 remark that:

> "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted without relevant change as §706(g)]. . . . Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require . . . firing . . . of employers in order to meet a racial 'quota' or to achieve a certain racial balance.' That bugaboo has been brought up a dozen times, but is nonexistent." 110 Cong. Rec. 6549 (remarks of Sen. Humphrey).

The Court also cited other examples of congressional intent:

> An interpretative memorandum of the bill entered into the Congressional Record by Senators Clark and Case [who were the bipartisan floor captains of Title VII and whose memorandum we have previously recognized as authoritative] likewise made clear that a court was not authorized to give preferential treatment to non-victims. "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of [Title VII]. This is stated

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[1] Section 703(h) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ." 42 U.S.C. §2000e–2(h).

[2] Section 706(g) affects the remedies available in Title VII litigation, and provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in such unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of 704(a) of this title.

42 U.S.C. §2000e-5(g) (1982).

[3] Indeed, Senator Humphrey's complete remark in this sentence reads: "Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require *hiring*, firing, *or promotion* of employees in order to meet a racial 'quota' or achieve a certain racial balance." (Emphasis supplied to the portion of the remark not cited by the Court.)

expressly in the last sentence of section [706(g)]. . . ." *Id.* at 7214.

Similar assurances concerning the limits on a court's authority to award make-whole relief were provided by supporters of the bill throughout the legislative process. For example, following passage of the bill in the House, its Republican House sponsors published a memorandum describing the bill. Referring to the remedial powers given the courts by the bill, the memorandum stated: "*But Title VII does not permit the ordering of racial quotas in business or unions.*" *Id.* at 6566 [emphasis added by the Court]. In like manner, the principal Senate sponsors, in a bipartisan news letter delivered during an attempted filibuster to each Senator supporting the bill, explained that "[u]nder title VII, not even a Court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title." *Id.* at 14465.

We believe the cause of equal justice under law is well-served by the *Stotts* decision. While more needs to be achieved, we trust that the tide has begun to turn decisively against preferential treatment, such as quotas, on the basis of race, national origin, and gender, and in favor of evenhanded civil rights enforcement for *all* American citizens.

Statement of Commissioner John H. Bunzel

It is plain nonsense to say that the Supreme Court's decision in *Firefighters* v. *Stotts* is a setback for civil rights and therefore another victory for those who want to dismantle affirmative action. Nor is the Court's decision, as some would have us believe, a triumph of backward-looking conservatism over progressive liberalism.

To speak in these terms is to substitute polemics and sloganeering for careful thought and analysis.

Senator Hubert Humphrey, throughout all of his life one of the Nation's leading activists in the civil rights movement, would have found in the majority opinion of the Court confirmation of his own position when the Civil Rights Act was debated and passed in 1964. Senator Humphrey made it very clear that, among other things, the intent of Congress in Title VII was to protect bona fide seniority systems.

What the Supreme Court has now done is reaffirm what Senator Humphrey, along with the liberal-labor alliance and his other colleagues from both political parties in Congress, expressed in unambiguous language 20 years ago.

The Court has also reaffirmed a fundamental principle embodied in the Civil Rights Act and one to which liberals and conservatives have long been committed—namely, that in our democratic society rights belong to individuals, not to groups.

The great majority of our citizens support nondiscriminatory affirmative action for the same reason that they oppose quotas and racially preferential treatment in hiring, firing, or promotion: they believe that a person should be judged on the basis of individual merit and not because of his or her race, color, or background. That is what equal opportunity is all about. It is not a liberal or conservative proposition, but an American idea and promise.

If the Supreme Court continues to build on its decision in *Stotts*, it will bring closer the day that race will become less, and not more, of a factor in our search for equal justice for all Americans under the law.

Statement of Commissioner Robert A. Destro

I concur in the Commission's statement on the Memphis firefighters case (*Firefighters* v. *Stotts*, 104 S.Ct. 2576 (1984)), but write separately to highlight two additional concerns that have largely been ignored in the aftermath of the Supreme Court's decision: the contribution of bona fide seniority plans to the protection of all workers generally, and the constitutional duty of Federal courts to apply the law as Congress wrote it.

There has been much criticism of the Supreme Court's decision in the *Stotts* case. Most of it, in my judgment, has not been justified. The Memphis seniority system was expressly found by the Court of Appeals for the Sixth Circuit to have been nondiscriminatory. As a result, the individuals who had acquired rights under that seniority system were entitled to protection in the courts by the express language of Title VII. The Supreme Court's opinion can be characterized as a "defeat" for civil rights only if one accepts the proposition that courts may ignore the law as written whenever the subject matter of the litigation is civil rights.

Bona fide, nondiscriminatory seniority systems are critical to the job security and advancement of millions of American workers and their families, including many minorities and women. The right to bargain collectively was recognized in this country only after the blood of American workers had been shed in the streets. Government antipathy towards the collective bargaining rights of workers was a prominent feature of that unfortunate period of American labor history. Thus, it was not surprising that one of the leading arguments against enacting Title VII was that it would destroy seniority rights. The consistent response of the supporters of the bill was to deny that Congress intended to subordinate bona fide seniority systems to racially preferential hiring or layoff plans. Senators Clark and Case, the "bipartisan captains" who were responsible for guiding Title VII through the Senate, stated that "Title VII would have no effect on established seniority rights."[1] Similarly, the Justice Department stated that Title VII "would have no effect on seniority rights" and gave the following example:

> If, for example, a collective bargaining contract provides that in the event of layoffs, those who were last hired must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where, owing to discrimination prior to the effective date of the Title, white workers had more seniority than Negroes.[2]

The record, therefore, is clear: Title VII was a compromise that allowed for an award of retroactive seniority for proven victims of discrimination, but did not allow for the elimination of seniority rights.

The reasons for this compromise should be apparent. Nondiscrimination laws and labor laws that protect collective bargaining contracts are complementary facts of the Nation's labor policy. Title VII was (and is) needed to protect the working person against unlawful discrimination on the basis of race, sex, religion, or national origin. The labor laws are needed to protect the rights of the worker to bargain collectively and avoid unfair labor practices. A seniority system, collectively bargained for and fairly administered, has a social value and utility all its own.

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[1] 110 Cong. Rec. 7213 (1964), quoted in Teamsters v. United States, 431 U.S. 324, 350 (1977).

[2] 110 Cong. Rec. 7207 (1964), quoted in Teamsters v. United States, 431 U.S. at 351 (1977).

Because seniority is not inconsistent with affirmative action, properly understood, the *Stotts* case is not a defeat for affirmative action. Affirmative action seeks to foster greater minority involvement in the work force at the entry level, and seniority systems operate above the entry level to protect all workers. Seniority systems will, in time, assure that the gains that are made through affirmative action will not be lost through discrimination. It would be foolish indeed to sweep away one of labor's greatest protections on the ground that it may sometimes operate to the short-term disadvantage of minorities and women. Unfortunately, "last hired, first fired" is a short-term disadvantage that is inherent in seniority systems, but this does not make seniority systems unfair. Once above the bottom rungs, safely protected by seniority, an employee's position is secured by both seniority and Title VII from the kind of discrimination that infects other more "unstructured" workplaces. The trade is not unreasonable, and all workers who attain seniority benefit from it.

The frustration of the minority community, however, is well-justified. The *Stotts* case is a reminder that vestiges of the discrimination openly practiced against it remain a problem in the workplace. In addition, unions have not historically been the champions of minority and women workers. Unions as well as management often slammed the window of opportunity in any face that was not white or male. This is what affirmative action and antidiscrimination laws were designed to remedy and prevent. In my judgment, unions have a moral obligation of fairness to all workers in the Nation that springs not only from notions of solidarity in the workplace, but also from their legally protected position as the bargaining agents of their members. They, along with management and government, have the responsibility of assuring that all workers are treated equally, regardless of race, sex, creed, or national origin. Organized labor, therefore, has a critical role to play in the process of breaking the barriers of present and past discrimination. But destroying seniority systems that are not *in and of themselves* discriminatory will not further that role. They protect workers, regardless of race, sex, ethnicity, or creed, and are the foundation stone on which most collective bargaining agreements rest.

We should be wary whenever government—in this case a Federal court—claims that power to deprive workers of such an important right in a manner inconsistent with written law. American society is held together by formal and informal agreements among the citizenry: constitutions, laws (which represent legislative compromises), contracts, and collective bargaining agreements. All are, ideally, designed to further justice and the public welfare. Title VII is one of those agreements embodied in a legislative compromise. For a Federal court simply to "decree" that a worker's contractual rights are to be set aside on the basis of his or her race, in the absence of a showing that an identifiable victim of discrimination must be compensated, perverts not only our system of justice "under law," but turns the traditional notion of equality before the law on its head.

This brings me to the role of the judges in this debate. The duty of a judge is to apply the law as it is written, and this is especially true of the civil rights laws, which are carefully crafted to address specific needs and rights. In the employment discrimination context, the power of the courts is derived from Title VII of the Civil Rights Act of 1964. Contrary to arguments I have read and heard in various academic and legal circles, no branch of the Federal Government, including the Federal courts, has "inherent" power beyond that which the Constitution and laws of the United States confer. The Supreme Court wisely faced this important issue squarely and rejected arguments that Federal courts have "inherent" authority to enforce their decrees in ways that are inconsistent with the statute upon which their authority rests. This is no defeat for civil rights; it is a reaffirmation that justice, in our system, is "under law" and that civil rights law is designed to protect the rights of all.

Whether we like it or not, protection of civil rights in this country depends on the commitment of the American people to the constitutional ideal of individual equality before the law. This is not to say that majorities define what is morally sound, for they are often misguided and need reminders that certain values are too important to be left to politics-as-usual. The Constitution is such a reminder. It limits the power of majorities to impose their will on minorities, and it limits the power of Federal judges to substitute their judgment for the law written by Congress.

As Justice White's opinion for the Court makes clear by quoting the late Senator Hubert Humphrey, the operative sections of Title VII were a legislative compromise. Promises were made to obtain votes that otherwise would not have been there for passage. That compromise defines the "consent of the governed," and no unelected court has the right under our Constitution to substitute its judgment for that consent. If it did, there would be no need to *have* a Congress that is often mired in messy political squabbles and unseemly compromises concerning the public interest. All we would need would be a friendly magistrate who would "do justice." What could be easier? Nothing, but democracy as we know it would be gone.

It is for these reasons that I concur and join in the Commission's statement.

Statement of Commissioners Blandina Cardenas Ramirez and Mary Frances Berry

As we consider the *Hishon* decision, we continue to be dismayed at the shoot-from-the-hip pattern of decisionmaking in which our colleagues indulge. There is nothing in the work of the reconstituted Commission to substantiate any change in our previous policies concerning Title VII of the Civil Rights Act of 1964. We have yet to convene hearings to listen to affected persons or from the public at large about the impact of any possible change in policies or the continued viability of existing Title VII remedies. Conversely, there is abundant evidence in studies by the Commission, including the 1981 statement, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*, that makes us "satisfied" also with the *Hishon* decision.

In their statement concerning *Stotts*, once again our colleagues in the majority insist on putting blinders on society concerning the tragic present and past effects of discrimination. Civil rights laws were not passed to give civil rights protection to *all* Americans, as the majority of this Commission seems to believe. Instead, they were passed out of a recognition that *some* Americans already had protection because they belonged to a favored group; and others, including blacks, Hispanics, and women of all races, did not because they belonged to disfavored groups. If we are ever to achieve the real equality of opportunity that is the bright hope and promise of America, we must not deny our history and present condition by substituting illusion for reality.

The Commission majority applauds the Court in *Stotts* for doing what it did not do. Nowhere does the Supreme Court decision state that preferential treatment cannot be used to remedy past discrimination for a class in nonseniority cases. In fact, the Court, after *Stotts* was decided, refused to hear an appeal from the Buffalo school desegregation decision that required the local school board to hire one minority teacher for every white teacher until the schools' faculties reflected the city's 21 percent minority population. The Court's refusal left standing a lower court order, even though the hiring violated the seniority system established by State law and collective bargaining. Coming on the heels of the same Court's refusal to grant *certiorari* in the Detroit Police Department case, it is unclear what the Court will decide in seniority cases on a different set of facts. But it is clear that statistical remedies to address discrimination have not been rejected by the Supreme Court. The Court may reach such a conclusion, but despite the Commission majority's preference, it has not yet.

Even more interesting is that in *Stotts*, the Court majority made the novel pronouncement that if a seniority system was adopted with discriminatory intent, a nonminority employee with seniority can be displaced in order to make whole a proven victim of discrimination. This means that if civil rights lawyers can absorb the costs of litigation involved in a full-scale trial proceeding, they can prevail.

It is true the Court in *Stotts* decided that, in the absence of proof of intentional discrimination in the adoption of a seniority plan, seniority takes precedence over protecting the gains made as a result of an affirmative action consent decree. In addition, the Court majority opinion does include some disturbingly ambiguous language about Title VII remedies helping only "actual victims." The discussion is ambiguous because "actual victims" of discrimination include people who never applied for jobs because they knew employers did not even accept applications from blacks, for example. For the Commission majority to seize on the ambiguous language as if it were the holding in the case betrays an unseemly eagerness to further debilitate the struggle for equal employment opportunity in our society.

We will have to wait for later cases to see what the Court means by its ambiguous statements concerning victims and make-whole relief. In particular is this so because the majority did not overrule the *Bakke* case. The writer of the majority opinion in *Stotts*, Justice White, joined three other Justices in a concurrence supporting Justice Powell's opinion in *Bakke* that Title VII does not bar the remedial use of race. Also, the legislative history of the 1972 amendments to Title VII shows bipartisan support for courts to order classwide remedial relief for Title VII violations. Furthermore, the original consent decree underlying the litigation in *Stotts*, like most Title VII consent decrees, did not require the identification of individual victims or for the employer to admit discrimination. By definition, therefore, as the dissenters pointed out, promotions and backpay went to people who were never shown to be "actual victims." The majority opinion does not challenge this result at all. The better part of valor is to avoid overdrawn generalizations from *Stotts*.

But if, as the Commission majority and President Reagan prefer, the Court should prohibit all race- or sex-conscious affirmative action remedies, that should be cause for dismay rather than glee. Commission studies, including *Social Indicators of Equality for Minorities and Women* and *Unemployment and Underemployment Among Blacks, Hispanics, and Women*, underscore the fact of continued employment disparities even for women and minorities who are educated and trained. Our studies, including the 1981 affirmative action statement, emphasize the efficacy of statistical remedies, goals, and timetables, and in the most egregious cases, in ensuring actual hiring and promotion of women and minorities. Just as businesses measure progress in production and other areas by numerical targets, so should they measure progress in affirmative action.

If as a nation we forsake the commitment to measurable affirmative action, we will erode our current efforts to ensure real equality of employment opportunity. Under such circumstances, we will be abandoning the quest for Martin Luther King's dream that by acting in this generation we would speed up the day when people "will not be judged by the color of their skin but the content of their character." As King acknowledged, the Constitution is colorblind, but the people were not and are not. If affirmative action is to mean nothing more than what our colleagues believe, let us hear no more about its empty promises and let us end the hypocrisy here and now.

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
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STATEMENT OF THE U. S. COMMISSION ON CIVIL RIGHTS CONCERNING THE DETROIT POLICE DEPARTMENT'S RACIAL PROMOTION QUOTA

The U.S. Commission on Civil Rights commends the City of Detroit for its desire to eradicate racial discrimination in its Police Department's employment practices and to increase the number of blacks in its police force. However, the Commission deplores the City's use of a racial quota in its promotion of sergeants to lieutenants as one of the methods for achieving its laudable objectives.

The courts examining the validity of the promotion quota concluded that the Detroit Police Department (DPD) engaged in pervasive discrimination against blacks from at least 1943 to the 1970s in all phases of its operations, including the hiring and promotion of employees, job assignments, and the treatment of black citizens. In July 1974, the City voluntarily adopted an affirmative action plan. One of the elements of the plan alters the method whereby sergeants are promoted to lieutenants. Prior to 1974, candidates for promotion who scored a minimum of 70 on a written test were ranked on a single list. Each candidate was accorded a numerical rating based upon a number of factors, including their score on the written examination, length of service, performance or service ratings determined by supervisors, degree of college education or credits, veterans' points, and an oral interview. Promotions were given to the highest ranking candidates on the list in numerical order until all available positions were filled.

The affirmative action plan does not change the basic criteria for determining which sergeants receive promotions to lieutenant. The plan, however, requires that two separate lists be compiled--one for black sergeants and the other for white sergeants. Rank on both lists is determined by use of the same numerical rating system in effect prior to 1974. Promotions are made alternately from each list so that one black officer is promoted for each white officer until 50% of the lieutenant corps is black, an event not expected to occur until 1990. Pursuant to the plan, a number of black sergeants have been promoted instead of white sergeants who would have ranked ahead of them if a single list had been used. The Supreme Court decided last week not to hear the case (Bratton v. City of Detroit).

The DPD's promotion quota is factually similar to one currently at issue in the case involving the New Orleans Police Department (Williams v. City of New Orleans), pending before the full Court of Appeals for the Fifth Circuit. It differs from the Memphis Fire Department case now before the Supreme Court. The Memphis case involves seniority-based layoffs which would reduce the pre-layoff percentage of black employees, a number of whom were hired and promoted following the City of Memphis' earlier agreement to two consent decrees.

In the Commission's view, enforcement of nondiscrimination law in employment must provide that all of an employer's discriminatory practices cease and that any identifiable individual who has been the direct victim of discrimination be returned to the place he or she would have had in the workforce in the absence of the employer's discrimination. Thus, each identifiable victim of the employer's discriminatory employment practices should be made whole, including the provision of back pay and restoration to his or her rightful place in the employer's workforce at the next available opening. Such relief should also, when appropriate, accord a seniority status to the victim of discrimination higher than that of an innocent employee who would have been junior to the victim of discrimination in the absence of their employer's discrimination (here the innocent third party properly must share the burden of his or her employer's discrimination against identifiable victims in order to afford an adequate remedy to those victims). These kinds of relief, of course, must be available in cases involving a whole class of actual victims of discrimination, as well as cases involving only one such victim.

In addition, the use of affirmative action techniques, as tools to enhance equal opportunity for all citizens rather than as devices to penalize some on account of their non-preferred racial, gender or other status, should also be required of employers found to have discriminated, and encouraged for all employers who wish to improve the quality of their workforce. These techniques include: 1) additional recruiting efforts, aimed at increasing the number of qualified minority (or female) applicants from which the employer undertakes nondiscriminatory, race-and gender-neutral hiring; 2) training, educational, and counseling programs for applicants and employees, targeted to attract minority (or female) participants and to enhance their opportunities to be hired or promoted on the basis of merit (rather than race or gender), but open to all on an equal basis.

"Simple justice" is not served, however, by preferring nonvictims of an employer's discrimination over innocent third parties solely on account of their race in any affirmative action plan. Such racial preferences merely constitute another form of unjustified discrimination, create a new class of victims, and, when used in public employment, offend the Constitutional principle of equal protection of the law for all citizens. The DPD's promotion quota benefits nonvictims as well as victims of past illegal discrimination in promotions in derogation of the rights of innocent third parties, solely because of their race. Accordingly, it is a device that should be eschewed, not countenanced.

The Commission believes that the use of racially preferential employment techniques, such as quotas, is not properly viewed as a situation pitting the interests of blacks against the interests of whites. Rather, each specific preferential plan favors members of the preferred group--of whatever race or gender--at the expense of the non-preferred group, which inevitably includes persons of diverse ethnic, religious, or racial groups, and sometimes includes females. Members of these groups have often been subject to past discrimination. Thus, in the New Orleans Police Department case, separate groups of Hispanic and female police officers, in addition to a group of white officers, intervened to object to the promotion quota favoring black males.

The Commission also rejects an "operational needs" justification for racial quotas, as Detroit advanced in favor of its promotion quota. The City asserts that it needs to increase black police officers at all ranks, in order to achieve more effective law enforcement and reduce discriminatory treatment against black citizens, and that the promotion quota was a necessary means of meeting those objectives. This justification amounts to little more than a claim that only black police officers can effectively provide law enforcement services to black citizens or supervise lower-ranking black police officers. Such a claim has no place in a free, pluralistic society made up of many diverse ethnic and racial groups striving to achieve fully the goal of becoming one nation. If accepted, it would justify a claim that members of a racial or ethnic group can be properly served or treated only by fellow members of that group, e.g., only black teachers can teach black children--or that only white teachers can teach white children. This claim would, in the words of Chief Justice Earl Warren, "turn the clock back" (Brown v. Board of Education (1954)) to the "separate but equal" days of the past, when public entities dispensed benefits, entitlements, and penalties of all kinds on the basis of a person's skin color. Such a claim, in short, would ultimately divide the nation rather than unite it.

Among the alternatives to racially preferential employment policies that a police department can use to meet its needs for more effective, and non-discriminatory, law enforcement, include: 1) vigorous enforcement of policies of non-discriminatory treatment of all citizens by its members, including the disciplining or dismissal of offending officers, and 2) provision of training and counseling programs for its officers to instruct and counsel them in the requirements of non-discriminatory law enforcement.

Nearly 25 years ago, Arthur L. Johnson, Executive Secretary of the Detroit Branch of the National Association for the Advancement of Colored People, testified about the poor relations between black citizens and the DPD before this Commission's predecessor. He said, in part, "At absolutely no point in their experience do Negroes in Detroit see the law enforcement agency as being truly color-blind . . ."

Unfortunately, the DPD's use of racial quotas demonstrates that it is still not truly color-blind, at least with respect to its employment practices.

Because the issues in the Detroit case are of such importance, the Commission is disappointed that the Supreme Court has declined to hear the case. The issue of racial quotas in promotions, as well as in hiring, will undoubtedly be presented for Supreme Court review in the future. The Commission hopes the Court will resolve the issue by reaffirming the principle of nondiscrimination and forbidding preferential treatment based on race, color, gender, national origin, or religion in favor of nonvictims of discrimination at the expense of innocent individuals.

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Sex discrimination?—the XYZ affair

CARL HOFFMANN & JOHN SHELTON REED

Group differences in occupational success are a stubborn fact of American life. The legislative attack on discrimination which culminated in the federal civil rights legislation of the 1960's was intended to remove that component of these differences brought about by systematic discrimination against individuals on the grounds of race, sex, religion, and other group memberships. But it remains the case that, in many situations, members of some groups are still more often hired, retained, and promoted than others. The resulting shift of emphasis from equality of opportunity to equality of result, adumbrated in Lyndon Johnson's Howard University speech of 1965, has led to the emergence of two distinct schools of thought regarding the remaining differences between what have come to be called "protected groups" and everyone else. Nowhere has the contrast between these two views been sharper, or the debate more heated, than with regard to the occupational status of women.

On the one hand, some argue that the persisting imbalances result from continuing bias and discrimination on the part of employers, more subtle than the simple refusal to reward qualified women, to be sure; it may even be unintended. Such less-than-rational ways of doing business as seniority systems, or fixed lines of progression with no opportunity for transfer between lines, or irrelevant requirements of education or prior experience may well put unjustifiable barriers to advancement in the way of groups of employees or would-be employees, groups which may be disproportionately female. Proponents of this view argue that we cannot know to what extent parity would result from market processes until, in fact, parity is established. Differences in the attitudes and behaviors of men and women are seen as reflecting women's perceptions that the opportunity structure is closed to them. Affirmative action, "goals," and quotas are necessary to undo the "effects of past discrimination" and start things over on an equal footing. The implicit assumption is that, thereafter, equality of result should follow.

Another view, however, has it that even after all discrimination, blatant and subtle, is eliminated, "imbalances" will persist as a result of the tendency of men and women to make different choices—even when given the same range of alternatives to choose from. Women, in other words, are likely to seek out and to remain voluntarily in different sorts of jobs than men. Those who argue this position point to one or more of three factors (though seldom to all three) to support their conclusion.

In the first place, although it has become impolite to say so, there are at least some biological differences between men and women. Such differences explain why no women play for the Pittsburgh Steelers and none ever will (except perhaps as a placekicker) unless the Steelers are subjected to involuntary "guidelines." It is at least possible that other occupations are wholly or partially closed to women for similar reasons, although the burden of proof should no doubt rest with someone who wants to assert that there is a performance-related, innate difference between men and women.[1]

A second factor sometimes adduced is that the early socialization of men and women tends to prepare them for different sorts of occupations. This fact may be deplored, but few would deny that it is at present and has always been a fact. For the time being, at least, sex-role socialization includes a strong occupational component. Men and women consequently enter the labor market with different abilities and aspirations (although this may be changing).

Finally, some point to the effects of traditional family roles on the job-related attitudes and behavior of husbands and wives (or those who expect to become husbands and wives). The traditional division of labor in the home will handicap even highly motivated and well-trained women, while it gives their husbands the freedom—indeed, the obligation—to seek occupational success. Particularly in a home where the husband is the only breadwinner, he is expected *to win bread.* And his wife is expected to support his efforts to acquire training and advancement.

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[1] It is considerably easier to demonstrate—or to assume without challenge—that the social fact of gender is job-related than to demonstrate that the biological fact of sex is. One thinks, for example, of washroom attendants.

These differences are especially acute when children are present. Rearing children is a compelling social function for women, one which competes with the demands of a job. Although this role is available to men, they are less likely (whether for biological or social reasons) to accept primary resposibility for it, and are more likely to be regarded as deviant if they do. *Their* responsibility to their children is likely to be seen and felt as one of providing material well-being, a responsibility quite consistent with striving for occupational success.

Whatever the basis for this view—whether it emphasizes biology, socialization, or current family roles—its implications are quite different from those of the view that sees most imbalance as resulting from discrimination of some sort. It implies that it is unreasonable to expect occupational parity between men and women soon, if ever, and that we should strive for equal treatment of individuals rather than equal results for men and for women. In particular, goals and timetables and all the rest will be and remain unwise and, in fact, illiberal. They will not have the desired effects, even in the very long run; they will undermine the economic organization of enterprise, by rewarding ascription rather than achievement; they will force employers to disregard not only their own interests but the desires of individual employees—desires the employer did nothing to produce.

Unlike the view of quotas as requiring, at most, a temporary sacrifice of economic rationality and fairness to individuals, this view has it that the sacrifice is permanent, for all practical purposes. The law should open opportunities and expand the range of choices for individuals—not interfere with rational business practice, individual decisions, or the fundamental institutions of society.

The policy debate

Clearly, in one view, employers are responsible for existing imbalances, ought to do something about them, and *can* do something without more than temporary and limited ill effects. In the other view, the situation results from factors outside employers' control, and (remediation aside) there is little employers can do that does not involve considerable and lasting cost to them, and injustice both to them and to individual employees. Obviously, it is important to know which view is more nearly, and more often, correct.

The Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs, the two federal agencies principally responsible for enforcing the law, have in effect assumed an answer. Their original and continuing interpretation of the law has been to require parity of results in hiring, promotion, pay, and so forth—even when no wrongful action has been demonstrated. If, for instance, the proportion of women among a company's supervisors is significanctly lower than the proportion among those from whom they are drawing, a *prima facie* case for discrimination exists, and the employer can be obliged to demonstrate either that the statistics are inaccurate or that the imbalance results from differences in other factors, such as education or prior experience. This last demonstration has sometimes been challenged successfully on the grounds that these "other factors" are not actually related to job performance.

In general, the courts have upheld the legality of this procedure and, both through approving the application of affirmative action procedures and through giving massive injunctive relief to aggrieved employees—requiring organizational and procedural changes on the part of employers—have appeared to agree with the view that parity is the "normal" outcome of a fair process. (On the other hand, the courts have recently upheld in some cases segmented labor forces, seniority systems, and the loose and amorphous standard of "business necessity"—decisions rightly seen as setbacks in the struggle for parity, if not for justice.)

Whatever the position of the federal agencies and the courts, however, it is not at all clear what measure of imbalance can reasonably be expected once all vestiges of illegal discrimination are removed. Will it be negligible, as their implementation of the law implies? Or will it be substantial, as several other lines of thought suggest?

It is difficult to answer the question empirically in even a single case, since the advocates of affirmative action are quite correct in their assertion that most companies have organizational features and practices that allow at least the *possibility* of discrimination against women. Few companies have internal labor markets with complete freedom of lateral movement: Most put employees into operative, clerical, professional, or management tracks and expect them to stay there, others have [illegible] fect. Even fewer companies feel obliged to inform all employees of all openings within the company. Fewer still hire on the grounds of basic skills and potential ability, without regard to formal education or previous experience. And very, very few hire only at the bottom and fill all management positions from below with people who began in clerical or operative positions.

If such a company could be found, then the contentions of the two schools could be put to the test. If men and women advance in the company at different rates, if they are found in different proportions at different levels, then it must be the case that this results from differences they bring to their employment, not from discrimination. As it happens, we have just such a company, and have conducted just such a test.

In August 1978, the XYZ Corporation,[2] a Fortune 500 company, approached Hoffmann Research Associates,[3] a North Carolina consulting firm, to conduct a study of its personnel practices. The company's motive was not altruistic: A sex discrimination suit had been filed in one of its divisions, and it stood to lose a lot of money. The division of XYZ in question was one with considerable sales and clerical responsibility. It employed roughly 6,000 persons, of whom 5,500 were in entry-level clerical positions, and 500 in supervisory and management positions, ranging from assistant supervisor to senior vice-president.

The charges of discrimination had been filed by several female clerks who pointed to the fact that, while 82 percent of the entry-level jobs were filled by women between 1971 and 1978, female clerks were only 74 percent of those promoted in 1978 and only 61 percent of those promoted in earlier years. Promotion at XYZ was always from one level to the next. Men were obviously much more likely than women to be promoted at this first level (although at higher levels in the company there was no difference in the promotion rates of men and women).

XYZ made no attempt to dispute these figures, but its management could not explain them. Discrimination was forbidden; an entire district supervisory staff had once been dismissed for such practices; XYZ's management was sure employees were treated fairly. There were no differences in education, training, or experience that could explain the differences, and seniority was not a factor. Management insisted that only knowledge of the job, performance, and leadership played a part in promotion, but never asserted that there were differences between men and women in these respects. The president of the company had started in an entry-level job in this particular division. The management of XYZ was genuinely puzzled.

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[2] The company has asked that it not be identified. Otherwise, no restrictions have been placed on our analysis or our reporting on it.

[3] Carl Hoffmann is the president of Hoffmann Research Associates. John Shelton Reed served as a consultant to HRA during the later stages of data analysis and in the writing of the report. They gratefully acknowledge the various contributions of Rachael Tayar, Hunter Hughes, and Herbert Hyman.

Their choice of Hoffmann Research Associates (HRA) to conduct the study may speak to their belief in their own innocence. The research firm came to the attention of XYZ because of its work for plaintiffs—in support of cases very much like the one against XYZ. The research task was to determine the reasons for the lower rate of promotion for female than for male clerks, and to study another pattern that management had noticed, that of women being less likely than men to apply for lateral transfer within the company.

Trained interviewers conducted private, personal interviews, on company time, with independent samples of 383 female clerks, 283 male clerks, and 204 supervisors (102 male and 102 female). The samples were drawn randomly and proportionately from some 20 offices in all parts of the continental United States.[4] The questions of particular interest to HRA were embedded in a lengthy "job satisfaction" questionnaire.

Promotion-seeking behavior

Somewhat to the researchers' surprise, data analysis quickly made it clear that male and female clerks at XYZ were promoted in almost exactly the same proportions as they expressed interest in promotion. On the face of it, the difference in promotion rates for men and for women did not result from practices and policies that discriminated against women, but from a pattern of behaviors and attitudes that led male clerks more often than female clerks to seek and to accept promotion.

In the year prior to the survey, twice as many men as women (28 percent compared to 14 percent) had asked to be promoted, and the company's response was, if anything, more positive toward the women who asked than toward the men (See Table I on page 27; the difference is not statistically significant). Similarly, equal proportions of men and women had been asked if they were interested in promotion, but among those asked, men were nearly twice as likely as women to have indicated that they were interested. Altogether, 39 percent of the male clerks had indicated, in one way or another, that they would like to be promoted; only 21 percent of the female clerks had done so. (In earlier years, the difference had been even greater: Among those who had been with XYZ in 1977 and before, 46 percent of the men and 19 percent of the women said they had indicated their interest between 1971 and 1977.)

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[4] Possible sampling error of plus or minus 5 percent should be allowed for the samples of clerks, and somewhat more for the samples of supervisors. Added

These ratios predict almost perfectly the relative rates of promotion for men and for women. Thirty-five percent of the clerks who expressed interest in promotion before 1978 were male, compared to 39 percent of those who were promoted; in 1978, 29 percent of those who expressed interest in promotion, and 26 percent of those who were promoted, were men. For both periods, the differences are small, and well within expected sampling error.

It seems reasonable to suppose that promotions will be offered more often to those who have indicated their availability, or at least not indicated that they are not interested. In fact, those who reported that they had sought promotion were twice as likely as the others to report that they had actually been offered promotion at some point.

We have one other indication of the behavior patterns that led to the observed differences in promotion. Ambitious clerks might stay well-informed about opportunities for lateral transfers, some of

TABLE I. *Self-Reported Promotion-Seeking Behavior, 1978 and Before.*[1]

	1978		1977 OR BEFORE[2]	
	MEN	WOMEN	MEN	WOMEN
Percent who requested promotion	28%	14%	30%	11%
Of those, percent reporting positive response	55	70	51	55
Percent asked whether interested in promotion	36	34	41	33
Of those, percent who expressed interest	74	43	69	35
Percent who indicated interest either way	39	21	46	19
(N)	(283)	(363)	(218)	(226)

[1] Source: [illegible] Research Associates survey of XYZ employees.

which offer more pay, responsibility, or opportunity. At XYZ, notices of openings are posted, and employees encouraged to "bid" on those that interested them. Twenty-five percent of the male clerks, compared to 10 percent of the female clerks, indicated that they followed the posted openings closely. If actual bidding practices reflected this ratio of interest, we would expect roughly 35 percent of all bids to have been from males. In fact, between 1973 and 1978, according to company records, 36 percent of the 5,708 bids by clerks were from men.

It appears, then, that male clerks at XYZ were promoted more often than female clerks to the same extent that they more often exhibited interest in promotion and engaged in promotion-seeking behavior.

Perceptions of discrimination can, of course, vary independently of actual practices. It would not be unprecedented to find a situation where some category of workers was subjected to systematic discrimination without being aware of it. Nor, in the present case, would it be surprising to find a widespread belief that female clerks were being discriminated against, particularly given the undeniable and striking differences in promotion rates and the present litigious climate.

But, as Table II on page 29 shows, although a good many respondents of both sexes were dissatisfied with various aspects of their jobs, only a negligible proportion complained about discrimination of any sort—sex, race, religious, or age—and males were more likely than females to complain. Female clerks were less likely than males to indicate that their own individual chances for promotion were "excellent" or "good," but when asked why they had not in fact been offered promotion, they were much more likely than males to indicate that they were known to be uninterested or that they were not qualified.

These data do not in themselves establish the absence of discrimination—any more than would widespread perceptions of discrimination establish its existence. But they do reinforce the evidence in the earlier analysis of even-handed treatment.

Aspirations and motivation

If, as we believe we have demonstrated, the difference in promotion rates between male and female clerks was not due to company policy or practice, the differences in behavior which did produce it remain to be explained. The explanation appears to lie in the fact that female clerks were likely to have lower aspirations than male clerks, less likely to have had the time or to have felt they had the ability for higher-level positions, more likely to have seen their employment as a "job" rather than as a stage in a career, and more likely to have sought better working conditions rather than advancement.

TABLE II. *Ratings of XYZ Promotion Policies and Perceived Reasons For Not Being Offered Promotion, By Sex.*[1]

	MEN	WOMEN
Percent saying "good" or "excellent"—		
Transfer policy	72%	80%
Policy of promoting from within	68	70
"An individual's" promotion chances	43	42
Own promotion chances	34	29
(N)	(281)	(360)
Reasons for not being offered promotion—		
Discrimination	3%	1%
Known not to be interested	27	41
Personality, personal history	19	10
Not qualified	14	25
(N)[2]	(230)	(300)

[1] Source: Hoffmann Research Associates survey of XYZ employees.
[2] Asked only of those not offered promotion in 1978.

Table III on page 30 presents some of the evidence on aspirations. Female clerks, it appears, were more likely than male clerks to have sought a clerical job specifically. Men were more likely to report that they were ready to accept any position that was open, evidently viewing their first position as simply an entree to the company. Men were also more likely to indicate an initial interest in a marketing job, while those women who did not seek to be clerks were more often looking for positions as secretaries or service workers. Men were somewhat more likely to desire to move from their present positions, and they thought of such moves in terms of promotion, while more than half of those women who wanted a change preferred to move laterally, to a position as a clerk of some other sort.

When we asked what these clerks' ultimate ambitions were, we found that women were twice as likely as men to be content with their present positions, and those who did aspire to higher positions set their sights lower than men: Only 14 percent sought positions above the level of supervisor, compared to nearly half the men.

In short, the women's ambitions, both for immediate advancement and long-term success, were more limited than the men's. This difference was present when they were hired; it was not something the company created.

TABLE III. *Past and Present Aspirations of Male and Female Clerks.*[1]

	MEN	WOMEN
Originally sought present position	45%	66%
Would like different position	67	57
Other clerical position	10	24
Supervisor, assistant supervisor, market representative	42	22
Ultimate aspirations		
Present position	21	39
Supervisor, assistant supervisor	12	27
Chief supervisor, manager	25	9
Executive	21	5
Other, don't know	20	20

[1] Source: Hoffmann Research Associates survey of XYZ employees.

TABLE IV. *What Promotion to Supervisor Would Mean, Responses by Sex.*[1]

	MEN	WOMEN
Would have to work more hours	63%	62%
Flexibility of hours would decrease	53	54
Harder to find someone to cover hours	73	70
Less access to desired shifts	47	44

[1] Source: Hoffmann Research Associates survey of XYZ employees.

Resource commitment and career

For most clerks, the first step up is promotion to assistant supervisor, a position which carries a modest increase in salary ($65.00 a month at the time of the survey), longer hours, rotating shifts, and a considerable increase in responsibility. Male and female clerks agreed (see Table IV, on this page) such a promotion would impose a number of burdens that they did not have to carry in their present positions. Unless one sees it as a step toward higher, and substantially more rewarding, positions—or unless one has few other commitments—there would seem to be little incentive to accept such a promotion if it were offered. We have seen already that men are more likely to see promotion in this light; it appears also they are likely to view other commitments as less inhibiting.

Table V on page 32 shows a number of attitudes and behaviors which bear on this question. Male clerks were willing or able to give up more, in general, to obtain promotion. They would have been more likely to accept a transfer, more likely to give up an optimal shift assignment. They were more likely to indicate that they had the time to devote to the job. While nearly half of the women said they would prefer to work only part-time, if that were possible, only 18 percent of the men shared that view; male agents were more likely to have worked substantial amounts of overtime.

For many more female than male clerks, the question of promotion was of little importance, because they did not intend to remain employed. Although the great majority of both male and female clerks planned to remain in the labor force, and had been in it without interruption, female clerks were significantly more likely than male clerks to plan to drop out, at least for a while, and more likely actually to have done so in the past. The most frequent reason given by men who had dropped out or planned to do so was to obtain additional education or training; a majority of the women indicated that their past or anticipated withdrawal from the labor force was for "family reasons."

Women, more than men, were unwilling or unable to make a number of sacrifices which, they recognized, career advancement requires. Moreover, a pattern of discontinuous employment, reflecting commitments other than to one's career, was more common among women than among men. Finally, women were substantially more likely than men to believe they lacked the ability to fill higher-level positions (see Table V). While the perceptions of female clerks—or, for that matter, those of male clerks—may be inaccurate, they can have the same effects as a real difference in abilities.

Table V also shows a composite index of motivation: Those who reported that they aspire to higher-level management, that they would give up a preferred shift schedule for promotion, and that they have the time and ability to be a chief supervisor are labelled [illegible] fall in this category twice as often as

TABLE V. *Trade-Offs Against Promotion, For Male and Female Clerks.*[1]

	MEN	WOMEN
Would prefer optimal shift assignment to promotion	33%	45%
Would not accept transfer to obtain promotion	12	28
Would prefer to have part-time job, if possible	18	44
Do not have time needed for chief supervisor's position	12	30
Expect to leave labor force for significant time before retirement	4	10
Worked less than 10 hours overtime per month last year	71	83
Voluntarily out of labor market for significant time in past	5	13
Do not have ability for chief supervisor's position	8	28
Composite index of motivation (see text)—"highly motivated"	61	31
(N, range)	(279-283)	(354-363)

[1] Source: Hoffmann Research Associates survey of XYZ employees.

women; 61 percent compared to 31 percent. This difference in motivation goes a long way toward explaining the observed difference in promotion-seeking behavior. As Table VI on page 33 shows, there was no difference between men and women with low motivation: Neither group was likely to have sought promotion. Those with high motivation were much likely to have done so—twice as likely if they were women, three times as likely if they were men.

Effects of marriage and parenthood

But why were women who were apparently motivated to seek promotion less likely than men actually to have done so?

The breakdowns by marital status which appear in Table VI suggest an answer. The differences between unmotivated men and women were relatively small, as were those between highly-motivated, *unmarried* men and women. *The largest difference between men and women in the table is that between highly-motivated married men and highly-motivated married women. Marriage appears to increase promotion-seeking among highly-motivated men and to decrease it among highly-motivated women.*

The male and female respondents were about equally likely to be married: 47 percent and 48 percent respectively. But while 21 percent of the males were married men with dependent children, only 10 percent of the women were married, with children at home.

TABLE VI. *Promotion-Seeking Behavior By Motivation, For Male and Female Clerks, Married and Unmarried.*

	PERCENT SEEKING PROMOTION (N) MEN	PERCENT SEEKING PROMOTION (N) WOMEN
Low motivation	16% (114)	16% (249)
Unmarried	14% (65)	20% (127)
Married	20% (46)	12% (122)
High motivation	53% (172)	33% (111)
Unmarried	47% (88)	36% (61)
Married	60% (84)	30% (63)

[1] Source: Hoffmann Research Associates survey of XYZ employees.

Evidently, female clerks were more likely either to have deferred child-bearing or to have dropped out of the labor force while they had dependent children. It may well be that the effects of marriage and parenthood on women would be even more pronounced than they appear to be if the sample of mothers were not self-selected to comprise those most committed to their jobs or most able to cope with conflicting demands of job and family.

For nearly all of our measures of motivation, commitment, promotion-seeking, and perceived ability to meet the demands of a new position, the effect of marriage—marriage *per se*, without the added complications of child-rearing—was to reduce the likelihood of promotion for women, on the average, and to increase that for men. Nevertheless, the company appears to have inquired about interest in promotion with an even hand: Among the unmarried, 32 percent of both male and female clerks reported that they were asked whether they were interested; among the married, who tended to be older and more experienced, 40 percent of the men and 36 percent of the women reported inquiries.

One implication of this analysis is that married male clerks were more likely than married female clerks to come from households where their job was seen as the principal career within the family. Table VII (page 34) confirms this. The demands of male clerks' jobs were usually seen as determining; female clerks had more often to compromise between the demands of their jobs, on the one hand, and those of their husbands' jobs and their own household responsibilities, on the other. These women were most often economic equals with their husbands, while their male colleagues usually had *the* economically important jobs in their families.

Thus, though practically none of the male clerks would have given up his job with XYZ if his spouse's career required a move, roughly half of the female clerks would have done so (but not all, by any means). Similarly, nearly all of the male clerks would expect their wives to follow them, if their XYZ jobs required a move; about half of the female clerks would expect their husbands to move with them. While nine out of ten male clerks said that their job was the most important in the family, female clerks were more evenly divided, and frequently volunteered that their jobs and their husband's jobs were equally important.

TABLE VII. *Indicators of Occupational Primacy Within Family, By Sex (Married Respondents Only).*[1]

	MEN	WOMEN
Would give up XYZ job if spouse's job required a move	4%	53%
Spouse would give up job if respondent's job required a move	92	55
Respondent's job more important to family than spouse's	90	34
Spouse's job more important	4	50

[1] Source: Hoffmann Research Associates survey of XYZ employees.

These impressionistic data are confirmed by a look at income figures. Female clerks, on the average, earned only slightly less than their husbands (about $400 a year) and 45 percent earned more. But 92 percent of the male clerks earned more than their wives, and the average income difference was substantial—especially, of course, for the 34 percent whose wives were not in the paid labor force at all. (Less than 1 percent of the married female clerks had husbands who were not in the paid labor force.)

Marriage means different things for male and female clerks. Most often, a married male clerk finds himself with a household primarily or even completely dependent on his present and future earnings. He usually expects that his family will adjust to the demands of his career. Those demands are in a strong position in the competition for his time and attention, and he faces no choice between his family role and his job: To a large extent, his family role *is* his job. But female clerks showed no consistent pattern of either primacy or subordination in the economic lives of their families. Their career decisions often required compromises, which need not go against their career interests, but would not necessarily favor them either.

The effects of parenthood were like those of marriage, only more so. It increased men's desire for promotion and their efforts to achieve it, and decreased both among women. The male and female clerks in our sample did not differ in their desire for additional children: 43 percent of the women and 42 percent of the men intended to have them. But the effects would be quite different: 17 percent of the women who planned to have children did not intend to remain in the labor force until retirement; only 4 percent of the men who planned to have children expressed an intention to leave, a figure virtually identical to those for male and female clerks who did not plan to have more children. Similarly, 23 percent of the female clerks who had children had been out of the labor force in the past, compared to 3 percent of the fathers in our sample. Childless female clerks, and male clerks with and without children were likely to have worked overtime and reported that they were available for any shift assignment; but mothers of children under 18 years, not surprisingly, reported less flexibility.

While parenthood, like marriage, means added responsibilities for both men and women, the responsibilities of wives and mothers conflict with their on-the-job behavior in ways that those of husbands and fathers do not. In this case, it limited women's ability to devote extra time, perhaps at unusual hours, to their jobs—an ability which these clerks recognized is required of supervisors.

Female supervisors

Many female clerks resolve the conflict between their household responsibilities and their husbands' careers, on the one hand, and their own careers, on the other, by lowering their levels of aspiration and by avoiding the added responsibilities that would accompany promotion. Another possibility, of course, would be to remain single, or childless, as had many female supervisors who sought, were offered, and accepted promotion. Although they were roughly the same age as male supervisors, only 46 percent were married, compared to 81 percent of the men, and only 9 percent had children under five years old, compared to 34 percent of the men.

Married female supervisors were much more likely than married female clerks to report that their job was the more important one in their household. Although only 22 percent of the female clerks consistently reported that their jobs were more important than their spouses', 42 percent of the female supervisors did so (compared to 78 percent and 77 percent of male clerks and supervisors, respectively). Sixty percent of the female supervisors earned more than their spouses, compared to 45 percent of the female clerks (and 92 percent and 94 percent of male clerks and supervisors, respectively). Six percent reported that their husbands are full-time homemakers, a response given by only one of 175 married female clerks.

In these respects, male clerks, in general, already "looked like" male supervisors: Nearly all of both groups came from households where their economic responsibility was, both psychologically and in fact, the principal one. Female clerks, as we have seen, were much less likely to be in that situation. Female supervisors, though, fell somewhere in between.

The pattern is repeated when we look at Table VIII on page 38. In nearly every respect, supervisors differed from clerks of the same sex in those characteristics that we have identified as important for promotion—characteristics that male clerks were more likely than female clerks to display. But notice two things about the table: In the first place, male clerks by and large thought and behaved more like supervisors than did female clerks (an implication of our earlier analysis). In the second place, and importantly, female supervisors differed relatively little from male supervisors. They displayed comparable levels of motivation, similar attitudes, and similar behaviors—and they had been rewarded for that with promotion.

Some, as we have noted, did this by avoiding marriage and parenthood, others by entering into marriages where the principal economic responsibility was theirs. In general, our data showed that the effects of marriage on the attitudes and behaviors of female supervisors were usually negligible, and as often in the direction of increasing motivation and promotion-seeking behavior as of decreasing it—a striking contrast to the situation for female clerks.

In short, those women who sought and accepted promotion at XYZ were disproportionately women who, whether willingly or through force of circumstances, had avoided the pattern of aspirations, values, and behavior which led many of their female co-workers to choose not to compete for promotion. They displayed characteristics which resembled those of male clerks and supervisors, and which set them off from many female clerks. In part, this is because many had remained unmarried, and few of the married women had small children. But even those who had married showed high levels of the promotion-related characteristics we have been examining: Marriage simply appears to have had less of an inhibiting effect on their aspirations and behaviors than on those of female clerks generally. The reason seems to be that they were more likely to have a household division of labor like that of their male co-workers, in which their occupational success played an important, even a primary, part.

Discrimination?

Did the relatively low proportion of women among those promoted reflect discrimination? Clearly the answer is no. It reflected differences in the behaviors and attitudes of male and female clerks —differences the company and its policies had no part in producing. These differences decrease as one moves up the organizational ladder, reflecting self-selection at each step: Those women who are prepared to seek and to accept responsibility are as likely to be promoted as men who do so.

Even at the supervisory level, though, some of the differences persisted, as we have seen. It should come as no surprise to learn, then, that XYZ's records show a much higher rate of voluntary self-demotion among female supervisors than among their male colleagues, and that the reasons given by women usually involve family demands or moves to a new locale required by their husbands' jobs.

If this survey had not been conducted, XYZ would almost certainly have lost the lawsuit, paid million-dollar damages, and been subjected to injunctive procedures setting up goals and timetables for the elimination of discrimination. If that had happened, it would have had unfortunate consequences for nearly everyone concerned.

In the first place, and obviously, male clerks who otherwise would have been promoted would have been passed over. Perhaps less obviously, female clerks who neither sought nor desired promotion might have faced pressure to accept it, resulting either in inadequate performance in higher-level positions or in stresses and forced changes in their family lives.

From the company's point of view, perhaps the worst feature of such an outcome would be the resulting deformation of its present structure of opportunity and rewards. XYZ Corporation has been the most successful company in its industry for years despite—or because of—the fact that it does not have a "management track." The excellence of its management depends on a screening process

TABLE VIII. *Promotion-Related Characteristics, By Sex, Among Agents and Supervisors.*[1]

	AGENTS		SUPERVISORS	
	MEN	WOMEN	MEN	WOMEN
Prefer promotion to desired shift	67%	54%	88%	86%
Aspire to higher management	79	60	88	82
Summary index of motivation "high"	61	31	75	75
Would not prefer part-time job	82	56	75	78
Household responsibilities do not restrict hours available	96	92	95	98
Worked overtime in past year	91	86	91	93
Have expressed interest in promotion	39	21	63	61
Follow postings of transfers	25	10	21	6
Would accept promotion to assistant supervisor	66	52	*	*

[1] Source: Hoffmann Research Associates survey of XYZ employees.
* Not applicable, since supervisors have already accepted a promotion.

at all levels of the organization that identifies talented people, committed to the company, and rewards them for initiative, leadership, knowledge of the job, and competitive spirit. Promoting people on the basis of group membership would be as alien to the company's way (and, management believes, as damaging to morale) as promotion on the basis of seniority or some other arbitrary standard.

If, as a result of the suit, XYZ were obliged to promote women less qualified or less committed than those employees who are now promoted, it might be necessary either to lower performance standards for all supervisors or for female supervisors separately—inviting either an overall deterioration of performances or difficulties when promoting out of the ranks of supervisors. If it maintained its present standards for supervisors, it would find either much higher rates of voluntary demotion among women (aggravating a pattern that already exists) or it would be necessary to invite another lawsuit by demoting more women involuntarily. A sorry mess all around.

Whatever happened, the consumers of XYZ's services would face higher prices to pay for the settlement, and would pay for the injunctive relief through the deterioration of service, if not through higher prices.

In short, equality of opportunity and equality of result appear to be antithetical at the XYZ Corporation. Those who argue for the latter rather than the former are eager to tamper with a complex, competitive system, and their search for simple solutions to complex problems may upset the engine of our prosperity—which relies on individual initiative and competition for rewards. In the long run, family structure, sex-role socialization, and child-rearing practices may change to accommodate women's participation as equals in the paid labor force. If so, they may attain equality of position, power, and reward in the economy. But while the family, socialization, and child-rearing may change, scarcity and competition and the need for economic growth and increased productivity will not.

We are not arguing against the application of the Civil Rights Act where discrimination truly exists. We argue here against the criteria for discrimination applied by the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs, the agencies charged with enforcing the act. A criterion of parity, the insistence that a category of individuals is entitled to rewards proportionate to its numbers and not to its members' performances, does not serve the common good. It is, in fact, antithetical to the social contract, implicit in the American tradition: An individual is entitled to the fruits of his labor, and group membership—whether in a hereditary nobility or a "protected group"—does not entitle him to benefits. This argument against the ideology of quotas is not new; it has been put better by others before, but it does not seem to be prevailing. It should.

What is a company's obligation to its female employees? It is obliged to offer them the same opportunities as men, and to reward them in proportion to their productivity. No more. It cannot, indeed *should* not, compensate women—or anyone else—for effort expended in the service of other commitments. The inequities (if such they are) of early socialization or of the division of labor in the American household are not the responsibility nor the business, in any sense of that word, of an employer.

If a company is so moved, however, it might reasonably seek to rationalize both its internal labor market and its relations to the external market—examining its seniority systems, lines of progression, training programs, and so forth. In these areas, employers may find that they can serve the interests of their employees from "protected groups" while serving their own as well, by expanding the range of opportunities for *individuals*, and rewarding those who seize them.

Mr. **Martinez**. Chairman Hawkins, would you like to make a statement?

Mr. **Hawkins**. May I ask permission to insert my statement in the record at this point, Mr. Chairman, and only use this time to commend you and the chairman of the Civil and Constitutional Rights Subcommittee of the Committee on the Judiciary for holding these hearings. I hope they will clarify the law that has been distorted.

My understanding is that witnesses on both sides have been invited. I have had some discussions with Mr. Thomas, Chairman of the EEOC, who I understand was unable to testify at this time but who has, I think, agreed to come up at a later date.

It is my understanding that you did invite the Assistant Secretary for Civil Rights at the Department of Justice, Mr. William Bradford Reynolds. If Mr. Reynolds is not the opposition, I don't know who is.

Certainly I hope that without commenting one way or the other at this time, however, that we actually get down to what I consider to be the central issue, and that is, that equal opportunity is the law of the land. If someone violates the law of the land or fails to uphold the law, including some individuals in the Department of Justice, I think we as policymakers, should be concerned about it.

I think the American people support the law of the land as it has been interpreted by the courts. If some individuals wish to take us back to the pre-1964 days, that may be their privilege, but I don't think the American people really are in accord with that effort.

I commend you and Mr. Edwards for these hearings.

Mr. **Martinez**. Thank you, Mr. Hawkins.

You are entirely right. We did invite both sides. There were people that did decline.

Your statement will be introduced into the record in its entirety.

[The information follows:]

OPENING STATEMENT OF AUGUSTUS F. HAWKINS
CHAIRMAN, COMMITTEE ON EDUCATION AND LABOR

AS CHAIRMAN OF THE COMMITTEE ON EDUCATION AND LABOR, AND AS ONE WHO HAS LONG FOUGHT TO PROMOTE AND PRESERVE EQUAL EMPLOYMENT OPPORTUNITY, I AM PLEASED TO BE HERE TODAY TO INQUIRE INTO THIS VERY IMPORTANT SUBJECT, THE SUBJECT OF AFFIRMATIVE ACTION. THESE HEARINGS WILL EXAMINE WHETHER AFFIRMATIVE ACTION CONTINUES TO BE USEFUL, NECESSARY AND LEGALLY PERMISSIBLE SINCE THE SUPREME COURT'S DECISION IN MEMPHIS FIREFIGHTERS v. STOTTS.

THESE HEARINGS ARE CRITICAL TO LAY BARE THE CRITICISM AND CONFUSION AND TO RESOLVE THE QUESTIONS THAT HAVE ARISEN CONCERNING AFFIRMATIVE ACTION AND GOALS AND TIMETABLES IN PARTICULAR, SINCE THE STOTTS DECISION. THIS CONFUSION HAS OCCURRED, IN GREAT PART, DUE TO THE JUSTICE DEPARTMENT'S ATTEMPT TO CALL IN TO QUESTION THE LEGALITY OF CONSENT DECREES - SETTLEMENTS REACHED BY PLAINTIFFS AND DEFENDANTS IN EMPLOYMENT DISCRIMINATION CASES - WHICH CONTAIN RACE AND SEX-BASED NUMERICAL GOALS AND WHICH WERE DESIGNED TO ERADICATE YEARS OF DISCRIMINATION.

SOME, INCLUDING THE JUSTICE DEPARTMENT, HAVE ARGUED THAT THESE GOALS ARE NO LONGER CONSTITUTIONAL; THAT THE SUPREME COURT IN ITS INFINITE WISDOM, STRUCK THEM DOWN WHEN IT HANDED DOWN STOTT'S LAST YEAR. OTHERS, INCLUDING MOST OF THE CIVIL RIGHTS COMMUNITY AND MOST OF THE FIFTY-TWO JURISDICTIONS WHICH WERE ASKED BY THE JUSTICE DEPARTMENT TO TRY TO OVERTURN THEIR CONSENT DECREES, HAVE READ STOTTS DIFFERENTLY, AND HAVE CONCLUDED THAT THE DECISION ONLY CLARIFIED THAT BONA FIDE SENIORITY SYSTEMS CANNOT BE DISTURBED EVEN IF THE RESULTS IN A LAY OFF SITUATION ARE THAT A DISPROPORTIONATE PERCENTAGE OF WOMEN AND MINORITIES MUST BE LAID OFF FIRST.

WE INTEND, IN THESE HEARINGS, TO CLEAR THE AIR - TO ESTABLISH WHETHER OR NOT AFFIRMATIVE ACTION, INCLUDING GOALS AND TIMETABLES HAS WORKED TO OVERCOME CENTURIES OF DISCRIMINATION AGAINST WOMEN AND MINORITIES, AND TO ESTABLISH WHETHER OR NOT RACE AND SEX-CONSCIOUS REMEDIES INCLUDING GOALS AND TIMETABLES REMAIN LEGAL, AS COURTS HAVE HELD FOR DECADES.

CHAIRMAN MARTINEZ, I CANNOT OVEREMPHASIZE THE IMPORTANCE OF THESE HEARINGS. I COMMEND YOU IN CONDUCTING THEM.

Mr. **MARTINEZ.** Mr. Dannemeyer.

Mr. **DANNEMEYER.** I heard the question, Mr. Chairman, but I didn't hear the answer. When will we on the minority side have a chance to have our witnesses heard?

Mr. **MARTINEZ.** I understand your rules in the Judiciary Committee do allow that, and that is up to your chairman, and I understand that that will be done.

Mr. **DANNEMEYER.** They are House rules.

Mr. **MARTINEZ.** Mr. Edwards.

Mr. **EDWARDS.** The rules are very clear, and they have always been honored by the Judiciary Committee and by the Committee on Education and Labor. These are House rules, and where there are hearings held, then the minority will always be given the opportunity to have its own witnesses. There is nothing in the rules about a day of hearings, but this is something that we have always complied with, and I'm sure we will in the future.

Mr. **DANNEMEYER.** Thank you, Mr. Chairman.

I have no further comments at this time.

Mr. **MARTINEZ.** The first witness we will hear from today is Jonathan Leonard, assistant professor of business administration, University of California at Berkeley.

Mr. Leonard, your statement will be entered into the record in its entirety. We would appreciate your summarizing and highlighting your testimony.

TESTIMONY OF JONATHAN LEONARD, ASSISTANT PROFESSOR OF BUSINESS ADMINISTRATION, UNIVERSITY OF CALIFORNIA AT BERKELEY

Mr. **LEONARD.** Thank you, Mr. Chairman, it's an honor to be here today.

I'd like to thank the committee. In particular, I'd like to thank Chairman Hawkins for the support that the Education and Labor Committee has given me in the past. I suspect without that support some of my work would not see the light of day. I'd also like to thank the Department of Labor for their support in the past and the EEOC.

To Mr. Sensenbrenner let me just say that I'm not reading out of a hymnbook, and the best evidence of that is that, if there was a hymnbook, it's a hymnbook that has been cited by the Special Analysis J of the Office of Management and Budget.

The work I am going to be talking about today is based on some research that was supported by the Department of Labor. My chief concern has been trying to determine whether affirmative action has worked, and I did that by looking at the computerized records of more than 70,000 plants and establishments across this country with more than 16 million employees. These are Department of Labor and EEOC and OFCCP records.

The evidence I have looked at suggests that, in fact, affirmative action has worked, and I think that's interesting because in the past 3 or 4 years you have heard two kinds of criticisms of affirmative action. The first is that affirmative action doesn't work, therefore we should get rid of it, and the second is that affirmative action does work, therefore we should get rid of it

The evidence, as I have seen it, and in a number of other studies now, I think, is fairly unanimous in saying that, in fact, affirmative action does work, particularly for blacks. Black employment has increased from 4 to 10 percent in contractor establishments that are covered by affirmative action relative to noncontractor establishments.

That has been pretty much across the board in terms of occupations. It's not true that it's only helping the highly skilled or the unskilled or that it's leading to a split in the minority community.

A major tool in that enforcement procedure has been compliance reviews. Compliance reviews, while they are not always effective in terms of the detailed enforcement mechanisms, and while they are not always well targeted, do appear to be effective. The plants and companies that undergo compliance reviews have increased the minority and female employment—certainly minority employment—faster than nonreview contractors.

The impact on white females, on other minorities, is mixed. There is some evidence that affirmative action has worked. There is a bit of evidence that in some places it hasn't worked, and I think part of that might be explained by just this ongoing movement of women into the labor force that just swamps the impact of any Government policy.

I think the employment gains that have been engendered by affirmative action are not transient. Men and women who move into corporations under affirmative action tend to stay there.

I should also note that, particularly in these times, economic growth—simply growth—is probably the single most effective policy for promoting minority and female employment. Affirmative action is really going to be running up against a brick wall if employment is not growing in firms, and it works best where employment is growing and where firms can best accommodate affirmative action pressures.

The fact that it works leads me then to ask a more controversial question, which is, has that reduced discrimination, or has it gone so far as to induce what is known as reverse discrimination? My evidence on that—I think anybody's evidence on that—is far sketchier. The best I can tell, it hasn't really induced any significant reverse discrimination, although I'm sure there are lots of scattered cases, but, in general, that doesn't seem to be a substantial problem.

I mentioned a minute ago the targeting. I think the targeting of compliance reviews could be improved substantially. It seems to me that if you were looking for the most blatant prima facie forms of discrimination, you'd go out and look at the firms or the plants with the fewest minorities or the fewest females. That's not what the OFCCP does. What they tend to do is go after medium-sized plants, without very much regard for their past regard of minority or female employment. I think that's something that could definitely be improved.

The final question is the system of goals and timetables that exists under affirmative action. Those have been criticized on two grounds. The first is that goals and timetables are really just a polite word for quota, and the second is that the whole system of goals and timetables is just an exercise in paper pushing and doesn't really accomplish anything. I think the truth lies someplace in the middle.

The goals are vastly inflated, by which I mean that firms that promised to hire ten blacks or females usually end up hiring about one. On the other hand, the goals are effective. The firms that promise more actually do more. To me, that suggests that in fact the system of goals and timetables is working as a system of goals, not as a system of rigid quotas.

So, in summary, based on my work, and now there have been about five or six other studies using quite detailed disaggregated data, the affirmative action program has worked in terms of increasing minority and, in many cases, female employment.

Thank you.

[The statement of Mr. Leonard follows:]

The Effectiveness of Equal Employment Law and Affirmative Action Regulation

Summary of Testimony of Professor Jonathan S. Leonard,
University of California, Berkeley,
for Oversight Hearings on Affirmative Action, July 10, 1985

This paper summarizes some recent empirical analyses of the impact of affirmative action under the Executive Order on employment and productivity. Most of the results are based on a comparison of federal contractors subject to affirmative action with non-contractors in a sample of nearly 70,000 establishments with more than 16 million employees between 1974 and 1980. The major findings are as follows:

(1) Black employment share increased relatively more in contractor establishments under the affirmative action obligation than in non-contractor establishments between 1974 and 1980. This holds true in a number of specifications, and it holds true controlling for establishment size, growth industry, region, occupational structure, corporate structure, and past employment share. This appears to reflect changed establishment behavior, rather than the selection into contractor status of establishments with high or growing black male employment share. In other words affirmative action appears to have been successful in increasing blacks' share of employment.

(2) This positive employment impact has been relatively greater in the more highly skilled occupations and has resulted in net occupational upgrading for minority males. It is worth noting that increases in black employment under affirmative action are not limited to low-skill jobs, nor to high-skilled jobs. It appears that affirmative action has promoted black employment across the occupational spectrum.

(3) Compliance reviews have been an effective tool in promoting the employment of blacks. Black employment share has increased faster at establishments that have undergone a compliance review.

(4) The impact of affirmative action on non-black minorities and on white females has been mixed. In particular, while white females gain under affirmative action in establishments where their initial share of employment is small, there is some evidence that their employment growth is slower under affirmative action where their initial shares are great and where there have been compliance reviews. To speculate on some possible explanations for this divergent effect across protected groups, there has been a large and continuing increase in the labor supply of women that may be swamping the relatively smaller demand side effects of affirmative action. Among non-black minorities, affirmative action appears to have been more effective in larger establishments.

(5) The employment gains engendered by affirmative action do not seem to be transient. Females and black males at a sample of reviewed establishments had a lower share of terminations relative to hires than other workers.

(6) Economic growth is among the best policies for bringing minorities and females into the workforce. Minority and female employment shares increase fastest at growing establishments which can more easily accommodate the pressures of affirmative action.

The finding of an effective affirmative action program leads us to ask whether this had reduced discrimination or gone beyond that to engender reverse discrimination. I attempt to open this question for research by exploring the productivity effects of regulation and changing demographics. The results from this analysis are more tentative than the others discussed here because they are based on more highly aggregated data with fewer controls, although I have also confirmed them at the disaggregated level of the corporation. The major findings of this analysis are that:

(7) Examining data on more than 1,700 class action suits decided in the Federal District Courts, class action litigation under Title VII of the Civil Rights Act of 1964 has played a significant role in increasing black employment and has a relatively stronger impact at an individual establishment than does being a federal contractor.

(8) The relative productivity of females and minority males has not significantly declined as their employment share has increased. In other words, I find no significant evidence of reverse discrimination at this level of analysis. This finding calls into question some of the large efficiency costs attributed to job redistribution under affirmative action and Title VII.

Given the finding that affirmative action has experienced some success in reducing racial employment discrimination, it is interesting to ask how enforcement might be improved. The evidence suggests that:

(9) Compliance reviews have not been intensely targeted against the a priori most likely practitioners of gross discrimination: those with the lowest proportions of minorities or females. The compliance review process, as part of the antidiscrimination effort, could be improved by targeting with greater frequency the establishments with the lowest proportion of minorities and females. The targeting system seems to contain a large ad hoc element, with insufficient attention paid to an establishment's past employment record.

In examining the impact of goals and timetables among a sample of contractors who had been reviewed more than once, I found that:

(10) While the projections of minority and female employment given by establishments under affirmative action are inflated, they are significant. Establishments that set higher goals subsequently achieve more. On the other hand, among these large reviewed establishments, detailed enforcement tools such as deficiency notifications and show cause notices do not appear to have had a significant impact on protected group employment.

Based on my empirical work, and on that of other economists, I believe that the claims that affirmative action has been ineffective have been overstated. There have now been five establishment level studies that agree in finding that black male employment share has grown faster in federal contractor establishments subject to affirmative action than in non-contractor establishments.

The policy of affirmative action has had a short and turbulent history in this country. Of all the social programs that grew during the sixties, it has perhaps enjoyed the least measure of consensus. Its bureaucratic organization and body of regulations have undergone change at frequent intervals since its inception. While the targeting of enforcement could be improved, and while the impact of affirmative action on other groups is still subject to question, the evidence in this study is that affirmative action and Title VII have been successful in promoting the integration of blacks into the American workplace.

For Congressional Oversight Hearings on Affirmative Action
Subcommittee on Employment Opportunities
of the Education and Labor Committee
Subcommittee on Civil and Constitutional Rights
of the Judiciary Committee

The Effectiveness of Equal Employment Law and Affirmative Action Regulation

Jonathan S. Leonard
Assistant Professor of Industrial Relations
School of Business Administration
University of California, Berkeley
July, 1985

Abstract

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The policy of affirmative action has had a short and turbulent history in this country. Of all the social programs that grew during the sixties, it has perhaps enjoyed the least measure of consensus. Its bureaucratic organization and body of regulations have undergone change at frequent intervals since its inception. While the targeting of enforcement could be improved, and while the impact of affirmative action on other groups is still subject to question, the evidence in this study is that affirmative action and Title VII have been successful in promoting the integration of blacks into the American workplace.

Affirmative action, mandated by Executive Order 11246 in 1965, is one of the most controversial government interventions in the labor market since abolition. In recent years, two major criticisms of affirmative action have been given prominent voice. The first is that affirmative action does not work; therefore, we should dispose of it. The second is that affirmative action does work; therefore, we should dispose of it My chief concern here will be with the first of these criticisms. While much has been said concerning the propriety of affirmative action in theory, little is known about the impact of affirmative action in practice. If affirmative action has not changed the employment patterns of non-whites and females, then much of the discussion since 1965 of its philosophical merits amounts to shadow-boxing. The goal of affirmative action is to increase employment opportunities for females and minorities. Has affirmative action been successful in achieving this goal? In this paper, affirmative action will refer to the provisions related to race, color and sex of Executive Order 11246 as amended by Executive Order 11375 [3 C.F.R. 169 (1974)]. This is distinct from affirmative action required as a remedy by judicial decision, which shall not be discussed here.

The purpose and development of affirmative action cannot be fully understood outside of history, a history that includes most saliently the institution of slavery in the 18th and 19th centuries, and the Civil Rights movement of the mid 20th century. The genesis in discord and crisis of the first Executive Order by President Roosevelt is most instructive. To protest employment discrimination at the beginning of World War II, A. Philip Randolph, President of the Sleeping Car Porters Union, threatened to disrupt the defense effort by a mass demonstration of blacks in Washington, D.C. on July 1, 1941. Less than one week before the planned rally, Executive Order 8802 was issued and the demonstration called off.(Goldstein, 1981, p. 10) In the words of the U.S. Commission on Civil Rights, "the Executive Order was prompted by the threat of a Negro March on Washington, which would have revealed to the world a divided country at a time when national unity was essential".(USCCR, 1961, p. 10) Accomodation was only reached under dire threat, and even then was of a limited nature.

The distance this country has come in terms of the growing import of affirmative action, expanding intervention by the federal government, and changing attitudes towards discrimination since 1941 can best be judged by considering the words of Mark Ethridge, first Chairman of the Fair Employment Practice Committee, established to supervise compliance with the executive order. In the following quote, Ethridge sharply limits the scope of anti-discrimination policy in a manner startling to modern eyes.

> Although he defended the granting of civil rights and equal opportunity to Negores, he also affirmed his personal support of segregation in the South. Stressing that 'the committee has taken no position on the question of segregation of industrial workers', he emphasized that 'Executive Order 8802 is a war order, and not a social document', that it did not require the elimination of segregation, and that had it done so, he would have considered it 'against the general peace and welfare . . . in the Nazi dictatorial pattern rather than in the slower, more painful, but sounder pattern of the democratic process.'(Ruchames, 1953, p. 28)

Of course, the delicate question of how to swiftly remedy the harm done by discrimination without distorting the democratic process is still with us, as is the question of whether the democratic process can function well outside an integrated society. Democratic society requires a consensus for change, but it depends upon the full participation of its members. The last forty years have witnessed a slow and at times painful process of confrontation and accommodation, developing a consensus that provides the foundation for a lasting change in attitudes towards discrimination.

Prior to Executive Order 10925, issued March 6, 1961 by President Kennedy, the anti-discrimination program for federal contractors lacked any real teeth. In a detailed study of the presidential Fair Employment Practice Committees, Norgren and Hill (1964, p. 169, p. 171) state: "One can only conclude that the twenty years of intermittent activity by presidential committees has had little effect on traditional patterns of Negro employment.", and that "It is evident that the non-discrimination clause in government contracts was virtually unenforced by the contracting agencies during the years preceeding 1961." Compliance programs, such as Plans for Progress and its predecessors, were voluntary. Their history strikes at least a cautionary note about the effectiveness of programs that have no legal sanctions behind them. The 1961 Executive Order was the first to go beyond anti-discrimination and to require contractors to take affirmative action, and the first to establish specific sanctions including termination of contract and debarment. Coming on the heels of Title VII of the Civil Rights Act of 1964, Executive Order 11246, which made the Secretary of Labor rather than a presidential committee responsible for administering enforcement, was the first to be enforced stringently enough to provoke serious conflict and debate. On October 13, 1967, Executive Order 11375 amended 10246 to expand its coverage to women, although effective regulation against sex discrimination did not reach full stride until after the Equal Employment Act of 1972 was enacted.

The details of the affirmative action obligation began to be elaborated in a twisting history. Detailed regulations, including numerical goals, were introduced in 1969, after the Comptroller General ruled that the affirmative action obligation was too vague to fulfill the requirement that minimum contract standards be made clear to prospective bidders. [48 Comp. Gen. 326 (1968)]. Numerical goals were first introduced in the manning tables embodied in the Cleveland and Philadelphia plans for construction contractors (see Jones), and later won the tacit approval of Congress and the courts.

Under Executive Order 11246, federal contractors agree "not to discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin, and to take affirmative action to ensure that applicants are employed and employees are treated during employment without regard to their race, color, religion, sex or national origin."[3 C.F.R. 169 202(1)(1974)]. This language imposes two obligations: first, not to discriminate; second, whether or not there is any evidence of discrimination, to take affirmative action not to discriminate. It is a measure of this nation's progress that the first obligation is now largely beyond debate. The redundant sounding second obligation, however, is anything but. It has provoked continual controversy, and its meaning and effect are not well understood. In the heated political arguments over whether and what affirmative action should be, mythic visions have come to overwhelm any clear conception of what affirmative action actually is. To say that this second obligation as it has been developed in the regulations, has provoked a good deal of debate would be a considerable understatement.[See also Fiss (1971) and Glazer (1975)] In the words of one legal expert:

> The affirmative action obligations imposed by the Contract Compliance Program are separate and distinct from non-discrimination obligations and are not based on proof of individual acts of discrimination. At the logical extreme, affirmative action and non-discrimination obligations can be viewed as mutually exclusive and inconsistent . . . in

> practice, the non-discrimination and affirmative action obligations may be incompatible when, for example, a less qualified, less senior female or black is granted a job preference that disadvantages a male or white solely on the basis of sex or race to achieve an affirmative action commitment.(Smith, p. 1028)

Reviewing the development of affirmative action into "quotas", Lawrence Silberman, former Undersecretary of Labor from 1970 to 1973, wrote:

> "In practice, employers anxious to avoid inquiry from government officials concerned only with results (rather than merely with efforts) often earmarked jobs for minorities without regard to qualifications. . . . In hindsight, one can see this was predictable. We wished to create a generalized, firm, but gentle pressure to balance the residue of discrimination. Unfortunately, the pressure numerical standards generate cannot be generalized or gentle; it inevitably causes injustice. . . . Our use of numerical standards in pursuit of equal opportunity has led ineluctably to the very quotas, guaranteeing equal results, that we initially wished to avoid. . . . To be sure, we were not solely responsible. Federal courts already had begun to fashion orders in employment discrimination cases which went beyond relief for those specifically discriminated against. The orders required employers found guilty of discrimination to hire in accordance with a set ratio of whites to blacks, whether or not new black applicants had suffered discrimination. Thus was introduced a group rights concept antithetical to traditional American notions of individual merit and responsibility. It was on that developing legal authority that the Philadelphia Plan was defended when challenged. . . . "

This raises at least two issues. The first is that an affirmative action program without measurable results invites sham efforts and may also fail to meet the requirement of federal procurement law that prospective bidders be informed of the minimum standards for a contract. On the other hand, numerical standards in the quest for equal opportunity open the door to an emphasis on equal results. The second issue raised is whether discrimination and its remedy should be addressed in terms of groups or individuals. James E. Jones, Jr., former Associate Solicitor of Labor for Labor Relations and Civil Rights, and an architect of the Revised Philadelphia Plan, takes (1977, p. 67) as his fundamental premise that:

> "the affirmative action obligation is a contractual undertaking imposed by the Executive Orders without concern for the guilt or innocence of the subject contractors and without concern for individual entitlement to the fruits of affirmative action efforts. Thus, an individual complaint oriented process of enforcement completely misperceives the function which should have been the major emphasis of the administrative process."

In the past the affirmative action obligation has been criticized as being vague and open-ended. In 1967, the Director of the OFCC, Edward Sylvester, stated: "There is no fixed and firm definition of affirmative action. I would say that in a general way, affirmative action is anything you have to do to get results. . . . Affirmative action is really designed to get employers to apply the same kind of imagination and ingenuity that they apply to other phases of their operation."(Report, 1967, p. 73-74)

To be vague concerning methods is the ideal decentralized approach, but this is also vague about the critical issue of ends. What is the goal against which results are judged: non-discrimination or increased minority and female employment? The distinct, practical question of whether the two can be distinguished in an operational sense is, of course, one of the important questions that will concern us here.

Past Studies

The literature on affirmative action can be divided into studies of the regulatory process that find it mortally flawed and studies of impact that find it successful. The process studies by the U.S. Commission on Civil Rights (USCCR), the General Accounting Office (GAO), and the House and Senate Committees on Labor and Public Welfare all conclude that affirmative action has been ineffective and blame weak enforcement and a reluctance to apply sanctions. For example, in its 1975 appraisal of the contract compliance program, the GAO found (p. 30) that "The almost nonexistence of enforcement actions taken could imply to contractors that the compliance agencies do not intend to enforce the program." That this is not merely politics can be judged from the fact that the Department of Labor has been sued with some measure of success more than once for failure to enforce affirmative action properly. See, e.g., the case of Legal Aid Society of Alameda County v. Brennan, 608 R.2d 1319 (9th Cir. 1979), cert. denied 100 S. Ct. 3010 (1980). Debarment, the ultimate sanction, has been used only 26 times; debarment of the first nonconstruction contractor did not occur until 1974. The GAO and USCCR have found that other forms of regulatory pressure, such as pre-award reviews, delay of contract award, and withholding of progress payments, have not been forcefully and consistently pursued. However, as evidenced by the increased incidence of debarment and back-pay awards, enforcement did become more aggressive after 1973.

In the light of the unanimity of these process studies in finding the affirmative action regulatory mechanism seriously deficient, it is surprising that the few econometric studies of the impact of affirmative action in its first years (Burman 1973; Ashenfelter and Heckman 1976; Goldstein and Smith 1976; Heckman and Wolpin 1976), all based on a comparison of EEO-1 forms by contractor status, have generally found significant evidence that it has been effective for black males. These few studies of the initial years of affirmative action (1966-73) are not directly comparable because of different specifications, samples, and periods. They do find, nevertheless, that despite weak enforcement in its early years, and despite the ineffectiveness of compliance reviews, affirmative action has been effective in increasing black male employment share in the contractor sector, but generally ineffective for other protected groups.(See Brown for a review) Of the four studies, Goldstein and Smith (1976) find the weakest effects. Their results indicate a .0004 yearly increase in black males' share of total employment and a decrease in the ratio of black to white males among nonreviewed contractors between 1970 and 1972. Heckman and Wolpin's (1976) results indicate an effect an order of magnitude greater, a .007 annual increase in black male's share of total employment between 1972 and 1973 comparing contractors and noncontractors. For comparison, Burman (1973) reports roughly a .003 annual increase in black males' share of male employment in the late sixties, and Ashenfelter and Heckman's (1976) results indicate a .0086 yearly increase in the ratio of black to white males between 1966 and 1970. These past studies are all based on data for a period that largely predates the beginning of substantial enforcement of regulations barring sex discrimination, the start of aggressive enforcement in the mid seventies, and the major reorganization of the contract compliance agencies into the OFCCP in 1978.

Despite weak enforcement in its early years, these studies generally conclude that affirmative action under the contract compliance program did lead to significant increases in black males' employment share in contractor firms. This econometric finding of a positive result is all the more notable in light of the consistently negative appraisal of the OFCCP's regulatory mechanism by Congress, the courts, the GAO, and the USCCR.

The Impact of Affirmative Action on Employment

Has affirmative action been effective in increasing the employment of minorities and women? Affirmative action under the Executive Order applies only to federal contractors. One method of judging the effect of affirmative action is then to compare the growth of minority and female employment at federal contractor establishments with their employment growths at similar establishments that do not bear the affirmative action obligation. With the cooperation of the U.S. Department of Labor, I performed such a comparison using EEO-1 data on employment demographics reported by 68,690 establishments in 1974 and 1980. This sample includes more than 16 million employees. The results summarized here are reported at length in Leonard (1983) and (1984a).

Table 1 [reproduced from Leonard (1984a)] compares the mean employment share of demographic groups in 1974 and 1980 across contractor and non-contractor establishments. Between 1974 and 1980 black male and female, and white female employment shares increased significantly faster in contractor establishments than in non-contractor establishments. The other side of this coin is that white males' employment share declined significantly more among contractors. Employment shares have increased for non-black minorities, but the differences across sectors in Table 1 are not always significant.

Affirmative action appears to have similar effects once other variables are controlled for. In other work I have estimated the impact of affirmative action after controlling for establishment size, growth region, industry, occupational and corporate structure. These additional controls help assure that differences between contractor and non-contractor establishments reflect the impact of affirmative action rather than other unobserved differences.

Table 2 [reproduced from Leonard (1984a)] shows a consistent pattern across demographic groups of effective affirmative action. Over a 6-year period the employment of members of protected groups grew significantly faster in contractor than in non-contractor establishments. The growth rate is 3.8% faster for black males, 7.9% for other minority males, 2.8% for white females, and 12.3% for black females. A summary measure, white male employment, grew 1.2% slower in the contractor sector. All of these effects are significant at the 99% confidence level or better, and the effects for blacks and for white males are robust across a number of specifications.

The demand shift for black males relative to white males estimated here for contractor status is similar to that previously estimated by Ashenfelter and Heckman (1976) and by Heckman and Wolpin (1976). The growth rate of black male employment over 6 years in the contractor sector is 3.8% greater than among noncontractors. Taking the sixth root yeilds an annual growth rate that is 0.62% greater in the contractor sector. For white males, the annual growth rate is 0.2% slower among contractors, so contract status appears to shift the demand for black males relative to white males by 0.82% per year. For comparison, using a different specification in a sample of integrated establishments for the earlier period 1966-70, Ashenfelter and Heckman report an annual shift corresponding to 0.86% per year.

Compliance reviews have played a significant role over and above that of contractor status, advancing black males by 7.9%, other minority males by 15.2%, and black females by 6.1% among reviewed establishments. Compliance reviews have retarded the employment growth of whites. The effect is significantly negative in the case of white females but small and insignificant in the case of white males--whom one would have expected to bear the brunt of the adjustment. The anomalous result for white females is sensitive to specification. It is also difficult to reconcile with the positive impact of contractor status on white females, but may be influenced by a review process that asks for more than last year, rather than more than average, in a time of sharply increasing female labor supply. For black and other minority males, the impact of undergoing a compliance review is roughly twice that of being a contractor. With the exception of white females, compliance reviews have an additional positive impact on protected group employment beyond the contractor effect. Direct pressure does make a difference.

The estimate in equation (3) is that the growth rate of black males' employment increased 3.8% more in contractor establishments, not counting the direct effect of reviews: 6.8% of all contractor establishments, accounting for 17.4% of all contractor employment, were reviewed in subsequent years. In these establishments the black male growth rate was an additional 7.9% faster than in nonreviewed contractors, so 12% faster than noncontractors. The total impact of affirmative action among contractors is then the weighted average of the annual 0.62% shift among nonreviewed contractors and the 1.91% shift among reviewed contractors, or 0.84% per year. The demand shifts for other minority males, white females, and black females are 1.69%, 0.37%, and 2.13%, respectively. The shift is largest for black females, although the ranking of these effects is sensitive to specification.

Employment opportunities depend critically on growth. Table 2 also indicates that minorities and females experienced significantly greater increases in representation in establishments that were growing and so had many job openings. The elasticity of white male employment growth with respect to total employment growth is .976, significantly less than one. This indicates that members of protected groups dominate the net incoming flows in both contractor and noncontractor establishments. The respective elasticities for black males, other males, white females, and black females are 1.22, 1.09, 1.02, and 1.19, all significantly greater than one. Particularly in the case of blacks, of whom the quantity supplied has not greatly increased, this suggests the importance of Title VII, which applies to all establishments in the sample, in expanding employment opportunities. Establishments that are not part of multiplant corporations have significantly lower growth rates of employment of members of protected groups. Corporate size is probably of greater consequence than establishment size, with larger corporations showing greater increases in minority and female employment. Establishment size itself has insignificant effects on white and black males, but other males and black females grow significantly faster at larger establishments, while white females grow significantly slower. It is also important to note that the tests here also control for the skill requirements of each establishment. Establishments that are nonclerical white-collar intensive exhibit faster employment growth for both male and female blacks and significantly slower growth for white males.

The efficacy of affirmative action depends critically on employment growth. The even-numbered equations in table 2 include interactions of contractor and review status with establishment size and growth rate. In every case, being a contractor or undergoing a compliance review have significantly greater effects if the establishment is growing. The evidence with respect to interactions of affirmative action with establishment size is mixed. To illustrate, equation (4) indicated that while black male employment grows 5.6% faster at contractor establishments than a noncontractor establishments with stable employment, it grows 6.7% faster at the mean total employment growth rate of 5.1%, and 7.4% faster if total employment grows by 15%. Affirmative action has been far more successful at establishments that are growing and have room to accommodate federal pressure.

The tests presented here suggest that while generating tremendous public criticism and resistance and while undergoing frequent regulatory reorganization, affirmative action has actually been successful in promoting the employment of minorities and females, though less so in the case of white females. In the contractor sector over a six year period affirmative action has increased the demand relative to white males for black males by 6.5%, for nonblack minority males by 11.9%, and for white females by 3.5%. Among females, it has increased the demand for blacks relative to whites by 11.0%. For a program lacking public consensus and vigorous enforcement, this is a surprisingly strong showing. While the gains of white females are smaller than those of blacks, it is important to keep in mind that the employment of females and minorities has been increasing in both sectors. Indeed, if the OFCCP pressured establishments to hire more females and minorities relative to their own past records rather than to industry and region averages, the observed pattern is just what we would expect to see during a period when female labor supply had been growing. Females' share would increase at all establishments because of the supply shift, and contractor establishments would be under little pressure to employ more females than noncontractors. The relatively short history of affirmative action for females may also help explain the differential impact of affirmative action across protected groups.

This section has reviewed significant large-sample evidence with detailed controls at the establishment level. Members of protected groups have enjoyed improved employment opportunities at contractor establishments subject to affirmative action, and compliance reviews appear to have been an effective tool in changing employment patterns. The evidence here is that a process that has been frequently criticized as largely an exercise in paper pushing has actually been of material importance in prompting companies to increase their employment of minorities and females.

Occupational Advance

One of the major affirmative action battlefields lies in the white-collar and craft occupations. It is in these skilled positions that employers are most sensitive to productivity differences and have complained the most about the burden of goals for minority and female employment. It is also in this region of relatively inelastic supply that the potential wage gains to members of protected groups are the greatest.

All four past studies of the impact of affirmative action on occupational advance have found that while affirmative action increases total black male employment among federal contractors, it does not increase their employment share in the skilled occupations. Burman (1973) found the employment impact of affirmative action to be largest in clerical and operative occupations, and negative, though insignificant, for managers between 1967 and 1970. He also found that affirmative action had an insignificant impact on an index of occupational status. Ashenfelter and Heckman (1976) extended these results, finding that affirmative action led to increases in black males' employment share, but that this was largest and most significant among operatives between 1966 and 1970. At the tops of occupational ladders, black males' share was estimated to fall relative to that of white males in the contractor sector, sometimes significantly. Overall, Ashenfelter and Heckman found no significant impact of contractor status on the relative occupational position of black workers. Goldstein and Smith (1976) found similar results between 1970 and 1972. Heckman and Wolpin (1976) found that black male employment gains were concentrated in blue-collar occupations between 1972 and 1973. They also found that contractors utilized a greater proportion of white males, and fewer blacks and females than did non-contractors in some white-collar occupations.

These studies suggest that contractors have been able to fulfill their obligations by hiring into relatively unskilled positions. Before 1974, affirmative action appears to have been more effective in increasing employment than in promoting occupational advancement. Some might argue that such a result is only to be expected given a short supply of skilled minorities or females. The presumption behind affirmative action, however, is that trainable members of protected groups will be considered for skilled employment. Even in the case of a small fixed supply, in its initial years affirmative action should induce a reshuffling of skilled blacks and women from non-contractor to contractor firms, without any upgrading of individuals necessary. By the late 1970s affirmative action was no longer as ineffective as it may have been in its early years in increasing minority employment in skilled occupations, according to results summarized here from Leonard (1984b). This difference may reflect the increasing supply of highly educated blacks, as well as a more aggressive enforcement program, in particular the consolidation of enforcement activities into the Office of Federal Contract Compliance Programs (OFCCP) in 1978.

The full story of the impact of affirmative action requires an analysis of employment data within disaggregated occupations. To test this Leonard (1984b) regresses the change in employment share on contractor and review status, establishment size, corporate structure, industry, region, and growth of total employment for the given demographic group, in samples of establishments reporting employment in nine occupations and two trainee positions. The evidence is most striking in the case of black males. In every occupation except laborers and white-collar trainees, black males' share of employment has increased faster in contractor than in non-contractor establishments, and except for operatives and professionals these differences are significant. This impact is found in both the proportionate change in black males' share of total employment, and in the proportionate change in the ratio of black male to white male share.

The marginal impact of a compliance review, conditional on contractor status, is also tested. The relative importance of being a contractor and of being a reviewed contractor is mixed across occupations, but in every case, except blue-collar trainees and clerks, reviewed establishments have increased black males' employment share more than non-reviewed contractors.

The total impact of the contract compliance program, the weighted sum of contractor and review effects, shows some evidence of a twist in demand toward more highly skilled black males. The contract compliance program has not reduced the demand for black males in low skilled occupations, except for laborers. It has raised the demand for black males more in the highly skill white-collar and craft jobs than in the blue-collar operative, laborer, and service occupations. While this may help explain why highly skilled black males have been better off than their less skilled brethren, it does not help explain why low skilled black males should be having greater difficulty over the years in finding and holding jobs.

Affirmative action has also helped non-black minority males, although to a lesser extent. There is evidence of a twist in demand toward Hispanic, Asian, and American Indian males in white-collar occupations, particularly in sales and clerical positions, and away from this group in operative and laborer positions. Compliance reviews have had a strong and significant additional impact in the professional, managerial, and craft occupations. The total impact of the contract compliance program on non-black minority males is positive in the white-collar, craft, and service occupations, and in training programs. Relative to white males, affirmative action has increased the occupational status of non-black minority males by 2%.

The evidence within occupations suggests that the contract compliance program has had a mixed, and often negative impact on white females. For technical, sales, clerical, craft, and trainee workers, contractor status is associated with a significant decline in white females' employment share. Compliance reviews have also often had a negative impact. While both contracts and reviews produce a significant 1% increase in white females' occupational status, this positive impact disappears when changes in white females' occupational status are compared to the relatively greater gains of white males.

In contrast to whites, black females in contractor establishments have increased their employment share in all occupations except technical, craft, and white-collar trainee. Compliance reviews have had a mixed effect across occupations. The positive impact of the contract compliance program is even more marked when the position of black females is compared with that of white females. Overall, black females' index of occupational status has increased 1% relative to that of white females under affirmative action.

The conclusion drawn from this detailed analysis of employment by occupation is that with the exception of white females, affirmative action appears to have contributed to the occupational advance of members of protected groups. In particular, for non-white males affirative action has increased demand relatively more in the more highly skilled occupations. In a useful and important paper, Smith and Welch (1984) show that part of this occupational upgrading may be overstated because of biased reporting on EEO-1 forms, in particular the upward reclassification of minority or female intensive occupations. The finding of occupational advance for non-white males in Leonard (1984b) is reinforced by evidence from CPS wage equations that affirmative action has narrowed the difference in earnings between the races by raising the occupational level of non-white males. These wage equations are reported at greater length in other work (Leonard, 1984d). To the extent that contractors may have selectively reclassified upwards black and female intensive detailed occupations at a faster rate than did non-contractors, this study and its predecessors will oversate the actual occupational advance due to affirmative action. Of course, pure reclassification would cause black losses in the lower occupations, which is generally not observed.

Affirmative action does not appear to have directly contributed to the economic bifurcation of the black community. As Leonard (1984d) shows, minority male wages increase relative to those of white males in cities and industries with a high proportion of employment in federal contractor establishments subject to affirmative action, although the effect is not always significant. Affirmative action appears to increase the demand for lowly educated minority males as well as for the highly educated.

If minorities and females do not share the skills and interests of white males, then perhaps the best one can expect from an affirmative action program is to increase their employment. But to the extent that minorities and females share the qualifications and interests of white males, an effective affirmative action program should improve their chances of sharing the same occupations too.

Just as no policy works in isolation, so none can be evaluated in isolation. The major finding reviewed in this section is that affirmative action has increased the demand for minorities in skilled jobs in the contractor sector. The relative demand shift has been greater for skilled than unskilled workers. The success of this program in skilled occupations after 1974, where none had been observed before, is probably due in part to the increasing supply of skilled minorities in many fields, as well as to the more aggressive use of sanctions after the early 1970's. The weaker results for white females must be considered in light of the massive increase in female labor supply that has led to increased frmale employment throughout the economy, and which may have obscured the contractor effect. We have also seen minorities and females enjoying the greatest gains at growing establishments, both contractor and noncontractor. The lesson drawn is that affirmative action programs work best when they are vigorously enforced, when they work with other policies that augment the skills of members of protected groups, and when they work with growing employers.

Goals or Quotas?

Have these employment advances been achieved through the use of rigid quotas? The goals and timetables for the employment of minorities and females drawn from federal contractors under affirmative action stand accused of two mutually inconsistent charges. The first is that "goal" is really just an expedient and polite word for quota. Affirmative action has really imposed inflexible quotas for minority and female employment. The second is that these goals are worth less than the paper they are written on. Affirmative action is a game played for paper stakes and has never been enforced stringently enough to produce significant results.

Under Executive Order 11246, federal contractors are required to take affirmative action not to discriminate and to develop affirmative action plans (AAPs), including goals and timetables, for good-faith efforts to correct deficiencies in minority and female employment. The aim of this section, which summarizes Leonard (1985b), is to measure good faith, to determine what affirmative action promises are worth. Is negotiation over affirmative action goals an empty charade played with properly penciled forms, or does it in fact lead to more jobs for minorities and females in the contractor sector? If the latter is the case, are these goals so strictly adhered to as to constitute quotas? Since the reviews examined here have already been shown to be useful (Leonard (1984a)), the question here is not "Are reviews effective?" but rather "Do promises extracted during the review process contribute to the impact of reviews?"

It is not beyond reason to suppose that they do not. Neither the penalties for inflating promises to hasten the departure of federal inspectors nor the prospects of being apprehended seems great. The ultimate saction available to the government in the case of affirmative action is debarment, in which a firm is barred from holding federal contracts. The first debarment of a nonconstruction cntractor did not take place until 1974, and in total only 26 firms have ever been debarred. If the Office of Federal Contract Compliance (OFCCP) finds the establishment's affirmative action plan unacceptable, it may issue a show-cause notice as a preliminary step to high sanctions. This step has been taken in only 1 to 4 percent of all reviews (USCCR, 1975, p. 297). Of these, one-third to one-half involve basic and blatant paperwork deficiencies such as the failure to prepare or update an AAP (US GAO, 1975, p. 26).

The other major sanction used by the OFCCP is back pay awarded as part of a conciliation agreement. In 1973 and 1974, $54 million was awarded in 91 settlements, averaging $63 per beneficiary (US GAO, 1975, p. 46). In 1980, in an even more skewed distribution, $9.2 million was awarded to 4336 employees in 743 conciliation agreements (USCCR, 1982, p. 47). These beneficiaries represented less than two-thirds of 1 percent of all protected-group employees at just the reviewed establishments. While these affirmative action sanctions have not been heavily employed, in many cases regulatory sanctions, like weapons of war, are judged most successful just when they are used the least. That does not seem to be the case here. The U.S. Civil Rights Commission, the General Accounting Office, committees of both Houses of Congress, and the courts have all concurred in the judgment that the contract compliance agencies have not made full and effective use of the sanctions at their disposal.

The low penalties if caught are compounded by the low probability of apprehension, although the Department of Defense (DOD), upon whose review this section concentrates, had one of the most vigorous programs. In 1976, DOD is reported to have reviewed 24 percent of its identified contractors, compared to an average for all compliance agencies of 11 percent [USCCR, 1977, p. 113]. In 1977, DOD had a ratio of 42 contractor facilities per staff member, and a total budget of $345 per contractor [USCCR, 1977, p. 107]. It is striking to note that compliance reviews have not typically been targeted directly against the most blatant form of employment discrimination. An establishment's history of employment demographics has typically not played a role in the incidence of compliance reviews, for a reason as procedurally obvious as it is logically obscure: compliance officers have not generally looked at an establishment's past AAPs or EEO-1 forms in targeting reviews. Heckman and Wolpin (1976) report that reviews are essentially random with respect to the level or growth rates of an establishment's demographics. Leonard (1985a) finds evidence that establishments with more blacks and females are actually more likely to be subsequently reviewed. These two empirical studies agree that affirmative action compliance reviews have not been targeted with greater frequency at establishments with relatively few minorities or females.

In this light, the expected penalties for making promises to the government with little regard for the likelihood of fulfilling those promises do not seem overwhelming. In such circumstances, affirmative action promises may contain little, if any, information about the establishment's future employment. On the other hand, the OFCCP may use more subtle and less easily observed pressures. Firms may care about their reputations, not only with the OFCCP but also with their own employees and the public, and so strive to set reasonable goals. More importantly, firms may react to the threat of Title VII litigation, with its substantial legal costs and penalties, hanging over their heads while under affirmative action review.

The employment goals that firms agree to under affirmative action are not vacuous; neither are they adhered to as strictly as quotas. While affirmative action promises are inflated, they are not hollow. For a sample of establishments that experienced more than one compliance review during the 1970s, Leonard

(1985b) compares the goals with the employment actually achieved one year later, as in Table 3. The mode year for which projections are made is 1976. For an observation in the mode year then, this table shows actual employment in 1974 and 1975, a projection of employment for 1976 made in 1975, and actual subsequent employment in 1976. The first finding in Table 1 is that establishments on average overestimate the growth of total employment. They project 1 percent employment growth one year ahead, but employment subsequently falls by 3 percent.

The major finding in Table 3 is that neither absolute minority nor female employment increased, but that both minority and female employment shares did increase. This is because the contraction in employment that did occur was almost lily-white and predominantly male. Most of the average employment decline of 27 was accounted for by white males, whose employment fell by 21. Put another way, while white males averaged 57-63 percent of initial employment, they accounted for 78 percent of the employment decline. Since females and minorities typically have lower seniority, they are usually found to suffer disproportionately more during a downturn. In this perspective, the finding here that white males accounted for most of the employment decline is itself striking evidence of the impact of affirmative action.

These establishments are projecting swift and substantial increases in black male employment. If the one-year projections in Table 3 are extrapolated for ten years, then fully 14 percent of the workforce at these plants would be black males.

These projections and actualizations can also be expressed as shares of total employment. Over time, minority and female employment shares are indeed growing, but not nearly as fast as projected. The firms project growth in minority and female employment share far in excess of their own past history, and far in excess of what they will actually fulfill. Is there then any information at all in their projections, or is the entire procedure an exercise in futility?

The administrative records of completed compliance reviews include data on past and projected employment demographics, indications of deficiencies found in affirmative action plans, and an indicator for preaward compliance reviews in which case one might expect the government's leverage to be greater. These records also indicate successively higher levels of government pressure brought to bear: hours expended by review officers, progress reports required, conciliation process initiated, and, finally, show-cause notice issued. Each of these mileposts in the bargaining process reflects both the establishment's resistance to bureaucratic pressures and, at the same time, increasing levels of bureaucratic pressure itself. If establishment resistance can be controlled for, then these may be taken roughly as inputs into a regulatory production function. By assuming that corporate resistance is controlled for by past growth rates of protected group employment share, and by initial notification of deficiencies, we can then ask what the marginal impact is on factors of regulatory production such as conciliation agreements and show-cause notices. These identifying assumptions are open to question. Caution should be exercised in interpreting the following results since they may be biased toward finding ineffective enforcement if enforcement has been targeted against the most recalcitrant cases.

For all detailed regulation variables, the results are mixed and often insignificant. One might expect greater growth in protected group employment in the case of preaward compliance reviews--reviews mandated prior to the final award of large federal contracts--supposedly because the carrot is dangling so close to the nose. On the other hand, few contracts have ultimately been lost in this process, and the courts have been loath to uphold this type of leverage. Twenty-nine percent of all the reviews studied Leonard (1985b) are preaward reviews, but only in the case of black females did they make a significant positive addition to protected-group employment share beyond that expected from a regular review.

One-third of the establishments were required to make interim progress reports. This marginally greater pressure had no significant impact on their subsequent demographics. One hundred twenty-two establishments, 3 percent of the total, signed conciliation agreements to remedy deficiencies in their AAPs. Perhaps their AAPs looked better, but their immediately subsequent demographics did not.

The ultimate enforcement tool at the Department of Labor's disposal is debarment, but none of the few actual uses of this deterrent shows up in our sample. The strongest pressure observed is a show-cause notice; 24 establishments received such notices offering them the opportunity to show cause why they should not be debarred. On average, they had not significantly altered their demographics a year later. On the whole, there is no compelling evidence here that these detailed components of the enforcement process have a significant impact on the employment of members of protected groups.

The major finding in Leonard (1985b) is that goals set in these costly negotiations do have a measurable and significant correlation with improvements in the employment of minorities and females at reviewed establishments. At the same time, these goals are not being fulfilled with the rigidity one would expect of quotas. While the projections of future employment of members of protected groups are inflated, the establishments that promise to employ more do actually employ more. The striking finding is that the affirmative action goal is the single best predictor of subsequent employment demographics. It is far better than the establishment's own past history, even controlling for the direct impact of detailed regulatory pressure.

This indicates that while establishments promise more than they deliver, the ones that promise more do deliver more, even conditioning on the past growth rate of employment share. There is significant information in the projection over and above what could have been predicted on the basis of past history. On the other hand, the projection falls far short of perfect information. For example, on average a projected 11 percentage point increase in the growth rate of black male employment share results in an actual increase of one percentage point, ceteris paribus.

Not only do establishments generally overpromise minority and female employment, they also overpromise white male employment. This reveals something of their strategy in formulating promises. They do not promise direct substitution of minority and female workers for white males; instead they promise more for all. More accurately, they promise to make room for more minority and female employees by increasing the size of the total employment pie. The first step in bringing these projections down to earth may simply be to ask the establishment whether the projected growth in total employment is reasonable.

We have a policy that appears to be effective in its whole and ineffective in its parts. The paperwork requirements of the AAP, the notification and resolution of AAP deficiencies, and even conciliation agreements and show-cause notices appear to have no general significant impact on subsequent employment demographics. On the other hand, protected-group employment share does generally grow more rapidly at reviewed firms, and goals are strongly correlated with this growth. Do our results then indicate only the establishments' projections reflect variations in supply known to them rather than induced variations in demand? Alternatively, can we infer that extracting greater promises will result in greater achievement? The critical evidence is that there is an overall response to pressure. Within labor markets of the same industry and region, reviewed contractors do better than the nonreviewed, as other work shows. As we have reveiwed here, within a given SMSA the establishments that set higher goals achieve greater growth rates of protected-group employment. My reading of this evidence is that while much of the nit-picking over paperwork is ineffective, the system of affirmative action goals has played a significant role in improving employment opportunities for members of protected groups.

The Targeting of Compliance Reviews

Affirmative action can be broadly conceived of as pursuing either antidiscrimination or job and earnings redistribution goals. That is to say, it can either pursue equality or opportunity or equality of result. Given the historical record, progress toward one goal will often entail progress toward the other. In particular, discrimination seems to be a broad enough target that it can be hit even with inperfect aim. The central question in this section, drawn from Leonard (1985a), seeks to answer is: what are the actual goals of affirmative action? The approach taken here is to infer the ends of affirmative action policy from an analysis of the historical record of actual enforcement.

Assertions concerning the ends of affirmative action are surprisingly common, especially when one realizes that only once in the past has the actual pattern of enforcement been analyzed. This pathbreaking study of Heckman and Wolpin (1976) examined the incidence of compliance reviews at a sample of 1185 Chicago area establishments during 1972. These compliance reviews are the first, the most common, and usually the last step in the enforcement process. Heckman and Wolpin find that the probability of review is not affected by establishment size, minority employment, or change in minority employment. They discover "no evidence of a systematic government policy for reviewing contractor firms". In other words, they find an essentially random enforcement process. This first analysis of targeting studied a relatively small sample in one city during the early 1970s, before the contract compliance program reached full stride. Do these early findings hold true for the nation as a whole after affirmative action regulations and procedures matured? Just as importantly, how are such results to be interpreted?

Which establishments does the OFCCP actually choose to review? Can we judge its motives from its targeting policy, and do the goals so revealed conform to those mandated in the Executive Order? The OFCCP has had, on paper, formal targeting systems such as the Revised McKersie System or the later EISEN system. These systems generally target in a sensible fashion against discrimination by selecting for review those establishments with a low proportion of minorities or females relative to other establishments in the same area and industry. But interviews with OFCCP officials in Washington and in the field suggest that these formal targeting systems were never really used. Instead of targeting on the basis of an establishment's past demographic record, compliance officers claim they simply reviewed the firms with the most employees, and the growing firms. This section shows which types of establishments were actually reviewed between 1974 and 1980, primarily by the Department of Defense. As such, the patterns shown here may not be indicative of current policies or practices of the OFCCP, nor of past practices of ther compliance agencies. In addition, part of the patterns observed here may reflect the requirements for pre-award compliance reviews.

The model of affirmative action as an earnings redistribution program has two testable implications. One can at best offer weak support for the hypothesis, while the second can provide somewhat stronger support. The first is that no particular pressure should be applied to firms with relatively few minorities or females. This is what we observe in Tables 4 and 5, reproduced from Leonard (1985a). While this strongly rejects the model of affirmative action as anti-discrimination in employment, it offers weak support for the alternative hypothesis of affirmative action as earnings redistribution because it is also compatible with other models of regulatory behavior. The second implication of the earnings redistribution model is that greater pressure should be brought to bear to shift demand curves where the supply of labor is relatively inelastic. In particular, this implies a higher incidence of compliance reviews at establishments with non-clerical white-collar intensive workforces. I find significant evidence that this is what the OFCCP has done.

If one thought of the OFCCP's primary concern as fighting the most blatant forms of prima facie employment discrimination directly in the workplace, one might then expect reviews to be concentrated at establishments with a relative small proportion of females and black males, controlling for size, industry and region. There is little consistent significant evidence of this in the past. In part, this may be explained by the requirement of pre-award compliance reviews. Establishments with the smallest proportion of minorities or females, ceteris paribus, are not consistently more likely to be reviewed for compliance with Executive Order 11246. Reviews are significantly more likely to take place, ceteris paribus, in non-clerical white-collar intensive establishments. Reviews are also more likely to occur at both large and growing establishments, where any costs of white males are likely to be more diffused.

How can the lack of a consistent targeting pattern by race or sex be explained? The larger establishments often employ a greater proportion of minorities and females. In interviews, field officers of the OFCCP have stated that they do not generally look at an establishment's past demographic record in targeting reviews. Reviewing large non-clerical white-collar intensive establishments with little regard for their past record of minority or female employment is consistent with an affirmative action effort that in terms of compliance review targeting is primarily concerned not with attacking the grossest prima facie forms of current employment discrimination, but rather with redistributing jobs and earnings to minorities and women.

The Impact of Title VII of the Civil Rights Act of 1964

While the central focus of this analysis has been on affirmative action under the Executive Order, it should be understood that the Executive Order has functioned within the backdrop of Title VII's Congressional madate and substantial legal sanctions. The dominant policy has been established under Title VII. What impact then has Title VII had? Without attempting to review this question as thoroughly as I have affirmative action, I can sketch some results. For a more complete discussion, see Brown (1984), Freeman (1981), Butler and Heckman (1977), and Smith (1978).

The broadest perspective may be gained by considering what changes have occurred in the earnings, income, occupational positions, and employment of blacks relative to whites before and after passage of the Civil Rights Act of 1964. In reviewing this evidence, Richard B. Freeman (1982, p. 3) finds that "virtually every indicator of positions shows a marked improvement in the economic status of employed black workers with -- as has been widely noted by various analysts -- gains concentrated among women, highly educated or skilled men, and young men. Virtually every indicator of positions also shows a marked acceleration in the economic status of employed black workers after 1964, when the U.S. antibias effort intensified as a result of Title VII of the Civil Rights Act of that year." (emphasis added) While a substantial part of this improvement can be attributed to the improved education of blacks [see Smith (1978)]; Title VII appears to have also contributed substantially and directly to improving the economic position of employed blacks at a given level of education.

While employed blacks appear to have approached parity with whites more rapidly since 1964, proportionately fewer blacks pass the initial hurdle of becoming employed. As Freeman (1982, p. 10) notes "At the same time that there has been a marked movement toward equality of earnings between employed blacks and whites, however, there has been a distressing deterioration in the likelihood of blacks holding jobs, particularly among the young. In 1964 the black male civilian employment/population ratio stood at .73, in 1969 it was .73, and in 1979 it was .64. By contrast, for white males, the ratio went from .78 (1964) to .78 (1969) to .75 (1979). Equally striking, the youth joblessness problem of the decade was one of increasing relative worsening in the black youth positions, for reasons that no one has yet satisfactorily explained. The aggregate data thus tell two stories: improvement for the employed but a reduction in the overall employment rate, especially in the 1970s".

More recently, attempts have been made by Beller (1979) and Leonard (1984c) to measure the impact of Title VII more directly using cross-sectional data. Beller (1979) examines the impact of EEOC sex-discrimination enforcement (complaint investigations and the ratio of successful to attempted settlements) on female and male earnings from 1967 to 1974. She finds some evidence that EEOC efforts have reduced the gender wage gap.

Class action suits under Title VII of the Civil Rights Act of 1964 are likely to have been among the most powerful prods to increasing minority and female employment, as Leonard (1984c) argues. Others have argued that the passage of the Civil Rights Act of 1964 reflected a diminished level of discrimination on the part of the electorate that one would expect to see reflected in improved employment opportunities for minorities and women even if the act were never enforced. Moreover, this line of argument proceeds, only a small proportion of establishments have been directly involved in Title VII litigation, so large effects are unlikely. This rosy view ignores the near defeat of the Civil Rights Act of 1964 and the continuing stream of litigation since, some of which has established broad precedents. Moreover, the Kennedy Administration believed the 1964 act was too strong to pass. Title VII, and in particular the clause extending protection to females, was supported by some congressmen because they believed it would doom the entire bill. It was precisely the provisions for enforcement through the courts that distinguished Title VII from its toothless, but equally noble, forebears and gave it prospects for effected change.

Before 1972, the Justice Department was empowered to bring suit through the courts for enforcement of Title VII's provisions. The EEOC's powers were limited to conciliation and persuasion. Since 1972 the power of litigation has been entrusted to the EEOC which, in turn, can pass it on to individual plaintiffs. By such recourse to the courts, the EEOC can sometimes accomplish in years what takes the OFCCP weeks. What it gives up in speed, though, it sometimes wins back in power through the setting of sweeping legal precedents. For example, the celebrated case of Griggs v. Duke Power did not simply aid Griggs or affect only Duke Power. By establishing the principle of disparate impact as prima facie evidence of discrimination, it placed a heavier burden on all employers to avoid the appearance of discrimination.

The major contribution of the EEOC, which oversees Title VII enforcement, has probably been in helping to establish far-reaching principles of Title VII law in the courts which can then be used by private litigants, rather than in directly providing relief from systematic discrimination through its own enforcement activity. A 1976 General Accounting Office review of direct EEOC enforcement activity concluded that it was generally ineffective. Most individual charges were closed administratively before a formal investigation. Charges took about two years to be resolved, and only 11 percent resulted in successful negotiated settlements. There was little EEOC followup to ensure compliance with conciliation agreements, and entering into a conciliation agreement caused no significant change in a firm's employment of blacks or females. Between 1973 and 1975, among 12,800 charges for which the EEOC found evidence of discrimination and was able to negotiate settlements, fewer than 1 percent had been brought to litigation resulting in favorable court decisions (U.S. GAO, 1976) Between fiscal years 1972 and 1976 the EEOC brought 462 cases to court (U.S. GAO, 1981). The much publicized charges brought by the EEOC against AT&T, GM, Ford, Sears, GE, and the International Brotherhood of Electrical Workers in the early seventies were largely anomalous. This major legal and public relations offensive was atypical of the Commission, which has normally been a reactive body slowly working its way through a mountain of individual complaints, many of which it discards as lacking substance. [See Hill (1983) for a critique.]

Despite its official mandate, the EEOC claims not to place great weight on such individual complaints in targeting enforcement, considering them unreliable. Rather, in interviews it claims to target by using EEO-1 forms to screen out establishments whose entry-level employment of protected groups compares poorly with that prevalent in the SMSA and whose professional employment falls short of the national norm. But according to the 1976 General Accounting Office report, "... the use of such (EEO-1) information in sophisticated methodologies for selecting targets for systematic enforcement activities has been minimal". The EEOC also claims to take into account community reputation, past charges, and the size of the company. It avoids large companies, finding them too hard to digest. Yet this targeting system has produced relatively few systemic charges. There is little evidence to suggest that the EEOC has focused its attention on large firms that systematically discriminate. I argue, however, that litigation under Title VII by private parties and by the EEOC constituted the cutting edge of government antidiscrimination policy.

Between 1964 and 1981 more than 5000 cases of litigation under Title VII, many of which were private suits, were decided in the federal district courts. More than 1700 of these were class action suits. These are the tip of an iceberg consisting of cases settled out of court or decided in state courts, but these class action decisions are likely to generate the most publicity, result in the largest awards, and affect the most people. What has been the impact of this Title VII litigation?

The enforcement of Title VII through the courts has contributed to a significant improvement of the employment and occupational status of blacks. In regressions of the change in the percentage of workers in an occupation who are members of a protected group on number of Title VII class action suits per corporation, percentage of employment in an industry by state cell that is in federal contractor establishments under the affirmative action obligation, and a lagged dependent variable, Title VII leads to sometimes negative but generally insignificant changes for white females, but to a moderate and significant improvement in the employment of blacks. The demand shifts for females may simply be swamped by the ongoing massive increase in labor supply. In addition, many of the early Title VII cases focused on racial rather than gender discrimination. The apparent ineffectiveness of antidiscrimination policy in promoting female employment remains an interesting question for research. Table 6 [reproduced from Leonard (1984c)] summarizes the impact of Title VII litigation. In this table Title VII litigation plays a significant role in increasing blacks' employment share.

For example, between 1966 and 1978 the proportion of all workers in manufacturing who were black increased from .08 to .12. On average, a Title VII class action suit per corporation raises this proportion to .277. Since there was an average of .011 such suits per corporation in a state by industry cell, about 7 percent of the improvement in black employment share can be attributed directly to Title VII litigation. The impact is even more pronounced for black females. This counts only the direct effects of litigation on firms in the same industry and state. In particular, it does not count the spillover effects onto firms in other industries and states from establishing credible threats and wide-ranging legal precedents. In fact, the greater the spillover, the less the differential impact of Title VII estimated here.

The proportionate impact of Title VII litigation is summarized in Table 6. This litigation has had its strongest impact in the white-collar occupations. Black gains through Title VII have been most striking in professional and management positions, suggesting that Title VII litigation has created pressure for occupational advancement as well as employment. The analysis here treats litigation under Title VII as exogenous. If one believes that Title VII suits that reach a decision in the federal district courts are more prevalent in firms with growing black employment, then the estimate presented here will be biased upward. More plausibly, in my judgement, if discrimination leads to both stagnant levels of black employment and to litigation, then my estimate of the impact of Title VII will be biased downward and the positive results shown here are that much more notable.

In sum, these results suggest that Title VII litigation has played a significant role over and above that of affirmative action. This impact has been greated for blacks than for women, and greater for the skilled than for the unskilled.

Antidiscrimination or Reverse Discrimination?

We have seen that despite poor targeting, affirmative action has helped promote the employment of minorities and women, and that Title VII has likely played an even greater role. This raises the most important and the most controversial question: has this reduced discrimination, or has it gone behond and induced reverse discrimination against white males? This is also the question on which our evidence is least conclusive. The finding of decreased employment growth for white males is not sufficient to answer the question since it is consistent with both possibilities.

The integration of the American workforce, by race and gender, has been among the most far-reaching and controversial goals of domestic policy in the past two decades. Some have argued that integration can be achieved only at great cost in terms of reduced productivity and profits, that forced equity will entail reduced productivity. Opponents of affirmative action have argued that employers were discriminating on the basis of merit, not on the basis of race or gender. If their contention is correct, then government policies that favor the hiring and promotion of minorities and women should cause a decline in their relative productivity. Equal pay restrictions will compound the inefficiency. The hypothesis inherent in this argument is that the relative marginal productivities of minorities and females have declined as their employment has increased and have not moved toward equality with relative wages.

Using estimates of production functions relating output to inputs for the manufacturing sector, Leonard (1984c) finds that relative minority and female productivity increased between 1966 and 1977, a period coinciding with government antidiscrimination policy to increase employment opportunities for members of these groups. There is no significant evidence here to support the contention that this increase in employment equity has had marked efficiency costs. The relative marginal productivities of minorities and women have increased as they have progressed into the workforce, suggesting that discriminatory employment practices have been reduced.

If we had observed that relative minority or female productivity fell while relative minority or female wages increased, one might suspect that government pressure under Title VII and Executive Order 11246 (affirmative action) had led to reverse discrimination. I find no significant evidence of reverse discrimination, nor of any signficant decline in the relative productivity of minorities or females. Direct tests of the impact of governmental antidiscrimination and affirmative action regulation on productivity find no significant evidence of a productivity decline. These results suggest that anti-discrimination and affirmative action efforts have helped to reduce discrimination without yet inducing significant and substantial reverse discrimination. However, the available evidence is not yet strong enough to be compelling on either side of this issue. Since the productivity estimates are not measured with great precision, strong policy conclusions based on this particular result should be resisted.

Conclusion

Based on my empirical work, and on that of other economists, I believe that the claims that affirmative action has been ineffective have been overstated. There have now been six establishment level studies that agree in finding that black male employment share has grown faster in federal contractor establishments subject to affirmative action than in non-contractor establishments.

The policy of affirmative action has had a short and turbulent history in this country. Of all the social programs that grew during the sixties, it has perhaps enjoyed the least measure of consensus. Its bureaucratic organization and body of regulations have undergone change at frequent intervals since its inception. While the targeting of enforcement could be improved, and while the impact of affirmative action on other groups is still subject to question, the evidence in this study is that affirmative action and Title VII have been successful in promoting the integration of blacks into the American workplace. Hopefully, evidence of the effectiveness of past affirmative action programs will be of some use as we prepare to enter the second generation of policy by troubled euphemism: non-preferential affirmative action.

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Table 1

Proportion of all Employees

Line	Demographic Group	Contractor Status	1974		1980		MeanΔ	Mean%Δ
			Mean	σ	Mean	σ		
1	Black	N	.053	.10	.059	.10	.006	28
2	Males	Y	.058	.10	.067	.10	.008	33
3			(6.0)		(9.4)		(6.5)	(3.6)
4	Other	N	.034	.10	.046	.10	.012	52
5	Minority	Y	.035	.08	.048	.09	.013	58
6	Males		(1.6)		(2.1)		(1.2)	(2.1)
7	White	N	.448	.27	.413	.26	−.034	−2
8	Males	Y	.584	.26	.533	.25	−.047	−4
9			(66.7)		(66.5)		(16.4)	(2.0)
10	Black	N	.047	.10	.059	.11	.012	47
11	Females	Y	.030	.07	.045	.08	.015	77
12			(24.0)		(19.2)		(5.7)	(10.8)
13	Other	N	.024	.08	.036	.08	.012	65
14	Minority	Y	.016	.05	.028	.06	.012	77
15	Females		(14.8)		(13.0)		(1.1)	(3.2)
16	White	N	.394	.27	.400	.26	.006	17
17	Females	Y	.276	.23	.288	.23	.012	30
18			(59.7)		(57.8)		(7.8)	(11.9)
19	Total	N	186	286	209	341	23	17
20		Y	271	728	276	720	5	21
21			(21.2)		(16.2)		(10.7)	(3.3)

NOTE.—*T*-tests across means in parentheses, on every third line. In every case, *F*-tests reject equality of variances across contractors and noncontractors, with more than 99% confidence. The last col. is the mean of percentage changes, not the percentage of change in means. *N* = noncontractor in 1974 (27,432 establishments); *Y* = contractor in 1974 (41,258 establishments).

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Table 2

The Effect of Contractor and Review Status on Employment Growth by Demographic Group ($N = 68{,}690$)

	Equations									
	White Males		Black Males		Other Males		White Females		Black Females	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
CONTRACT	−.012	−.032	.038	.056	.079	−.017	.028	.088	.123	.015
	(.003)	(.014)	(.011)	(.048)	(.014)	(.058)	(.006)	(.026)	(.013)	(.055)
REVIEW	−.00075	−.067	.079	−.189	.152	−.309	−.030	−.049	.061	.567
	(.004)	(.023)	(.015)	(.078)	(.018)	(.095)	(.008)	(.042)	(.017)	(.090)
ln *GROWTH*	.976	.982	1.223	1.117	1.087	.952	1.016	.970	1.190	1.067
	(.003)	(.005)	(.009)	(.018)	(.010)	(.022)	(.005)	(.010)	(.010)	(.021)
ln *SIZE*	.0018	−.0018	.0019	.0002	.050	.029	−.005	.003	.020	.013
	(.0011)	(.002)	(.0040)	(.007)	(.0040)	(.009)	(.002)	(.0049)	(.004)	(.008)
SINGLE	.028	.029	−.010	−.003	.064	.077	−.077	−.077	−.076	−.066
	(.004)	(.004)	(.013)	(.013)	(.016)	(.016)	(.007)	(.007)	(.015)	(.015)
PWC	−.076	−.066	.093	.087	−.006	−.016	−.029	−.034	.006	.003
	(.007)	(.007)	(.002)	(.022)	(.026)	(.027)	(.012)	(.012)	(.025)	(.025)
CXG	. . .	−.0009	. . .	.126	. . .	.153	. . .	.042	. . .	.113
		(.006)		(.021)		(.025)		(.011)		(.024)
CXS	. . .	.0037	. . .	−.002	. . .	.018	. . .	−.010	. . .	.018
		(.002)		(.008)		(.010)		(.004)		(.009)
RXG	. . .	−.043	. . .	.057	. . .	.124	. . .	.107	. . .	.294
		(.008)		(.027)		(.032)		(.014)		(.031)
RXS	. . .	.009	. . .	.038	. . .	.066	. . .	.004	. . .	−.067
		(.003)		(.011)		(.013)		(.006)		(.012)
R^2	.70	.70	.25	.25	.15	.15	.45	.45	.20	.20

NOTE.—Standard errors in parentheses. All equations include 27 industry and four region dichotomous variables. *CONTRACT* is a dichotomous variable set to one if the establishment was part of a federal contractor company in 1974. *REVIEW* is a dichotomous variable set to one if the establishment had a compliance review between 1975 and 1979. *SINGLE* is a dichotomous variable set to one if the establishment was not part of a multiestablishment company. *PWC* is the proportion of nonclerical white-collar employees in 1974. *SIZE* is total employment in 1974. *GROWTH* is total employment growth rate, 1974-80. *CXG* is the interaction of *CONTRACT* × ln *GROWTH*. *CXS* is the interaction of *CONTRACT* × ln *SIZE*. *RXC* is the interaction of *REVIEW* × ln *GROWTH*. *RXS* is the interaction of *REVIEW* × ln *SIZE*. The dependent variable is the logarithm of the growth rate of employment of the given group.

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Table 3

MEANS OF PROJECTED AND ACTUAL EMPLOYMENT LEVELS BY DEMOGRAPHIC GROUP (N - 5240)

	Mode Year			
	1974 Lagged 2 Years	1975 Lagged 1 Year	1976 Projection	1976 Actualization
Black male	54	55	61	54
Minority nonblack male	38	40	42	40
White male	628	623	615	602
Total male	720	718	718	696
Black female	34	35	39	35
Minority nonblack female	20	21	23	22
White female	218	216	222	210
Total female	272	272	284	267
Total	992	990	1001	963

Note: The first column is the actual level of employment one year before the projection was made. The second column is the actual level of employment in the year the projection was formed. The third column is the projection. For the mode observation, this is a one-year-ahead projection made in 1975 for the level of employment expected to occur in 1976. The fourth column is the level of employment actually realized in the following year.

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Table 4

Proportion of Defense Contractor Establishments Reviewed from 1975 to 1979, by 1974 Black Male Employment Share (*N* = 7,968 Establishments)

Line	Black Male Employment Share, 1974	*N*	Proportion Reviewed
1	.00	1,773	.106
2	.01–.02	1,672	.226
3	.02–.04	1,260	.263
4	.04–.06	761	.254
5	.06–.08	490	.255
6	.08–.10	380	.279
7	.10–.20	911	.301
8	.20–.50	633	.273
9	.50–.70	72	.083
10	.70–1.00	16	.188

Reproduced from Leonard 1985a

Table 5

Proportion of Defense Contractor Establishments Reviewed from 1975 to 1979, by 1974 Female Employment Share (*N* = 7,968 Establishments)

Line	Female Employment Share	*N*	Proportion Reviewed
1	.00	74	.000
2	.00–.05	1,073	.161
3	.05–.15	2,072	.217
4	.15–.25	1,093	.233
5	.25–.30	397	.252
6	.30–.35	404	.277
7	.35–.40	404	.297
8	.40–.50	707	.270
9	.50–.70	980	.232
10	.70–1.00	764	.283

Reproduced from Leonard 1985a

Table 6

ESTIMATED EFFECT OF THE NUMBER OF TITLE VII CLASS ACTION SUITS DECIDED IN THE FEDERAL DISTRICT COURTS ON THE 1978 PROPORTION OF EMPLOYMENT BY OCCUPATION, 1966–1978

	Mean		% Change 1966–78	% Change in Proportion Due to a Change in Number of Cases per Firm	Change in Standard Deviation of Proportion Due to a Standard Deviation Change in Number of Cases
	1966	1978			
1. Black proportion of all employment	.081	.120	48	3.4**	.088
2. Black male proportion of male employment	.085	.112	32	2.9**	.083
3. Black female proportion of female employment	.056	.135	141	13.0**	.213
4. Black proportion of all white-collar employment	.011	.042	282	12.4**	.150
5. Black male proportion of male white-collar employment	.010	.034	240	11.0**	.148
6. Black female proportion of female white-collar employment	.012	.060	400	22.5**	.210
7. Black proportion of all profes. and managerial employment	.005	.029	480	31.6**	.246
8. Black male proportion of male profes. & managerial employment	.005	.026	420	28.8**	.238
9. Black female proportion of female profes. & managerial employment	.011	.048	336	28.6**	.258
10. Black proportion of all blue-collar employment	.104	.150	44	3.0**	.082
11. Black male proportion of male blue-collar employment	.109	.144	32	2.4**	.072
12. Black female proportion of female blue-collar employment	.082	.174	112	10.5**	.196

Note Estimated from regressions for 555 state by industry cells in manufacturing, with 1966 proportions of blacks in relevant category, and cell proportion of employment in federal contractor establishments held fixed.

** Significant at 1 percent level.

Reproduced from Leonard 1984c

Mr. **Martinez**. Thank you, Mr. Leonard.

We have heard it often, and we heard it again here today, that affirmative action policies actually hurt minorities and, in some cases, create reverse discrimination. Would you elaborate on your personal opinions on those statements that are made like that?

Mr. **Leonard**. Yes. I guess I'd take those statements more seriously if I heard them coming more from the affected minorities. I think if the affected minorities were really being hurt by it, you'd be seeing a political movement led by those people to get rid of these programs.

In terms of what I observe in my empirical work, I suppose the people you would most expect to be hurt by affirmative action might be those without skills.

One of the arguments is that, if you are under affirmative action pressure, you'll just go for the cream of the minority population, but, in the data I've looked at, affirmative action seems to help the relatively unskilled minorities as much as it helps the highly skilled.

I have not seen evidence that it has hurt members of minorities. There is some evidence that, under compliance reviews, white females sometimes get hurt, but in general I have not seen evidence that it has hurt minorities.

Mr. **Martinez**. Is it the present feeling of the administration that individual discrimination is the kind of discrimination that merits some kind of action?

In the past, when this whole movement first started, there were class action suits. How do you, in your studies, determine what is more effective, the class action suits or action by individuals?

Mr. **Leonard**. I also looked at a subsample of firms that had been sued under Title VII with class action suits, and you can compare what happens there with firms that have no affirmative action pressure and firms that have affirmative action and firms that haven't been sued at all.

I think anybody who has talked to a major American corporation who has been under this kind of pressure realizes that, just in view of the substantial liabilities under a class action suit, that is a substantial sanction, and it's something that firms pay attention to.

In my evidence, the firms that have been hit with class action suits decided in the Federal district courts have cleaned up their act very quickly.

Mr. **Martinez**. In your studies, were you able to determine how many people who were actually discriminated against actually come forward and implement a suit versus those same people that would wait instead for a class action suit to be undertaken on their behalf.

Mr. **Leonard**. No, sir. I've heard stories like that, but I have no way of knowing about that myself.

Mr. **Martinez**. Mr. Edwards.

Mr. **Edwards**. Thank you, Mr. Chairman.

Professor Leonard, I found your testimony very, very helpful. I just have one general question, because you asked most of the questions that I'm interested in, Mr. Chairman.

With regard to goals, the enemies of affirmative action—and there are plenty of them nowadays—always equate affirmative action with quotas. You and I know that they are two different issues.

What about companies and institutions that set goals for employment of women and minorities? Do they generally have a better record insofar as fair employment is concerned?

Mr. **Leonard**. The evidence that I have looked at—and it's all the evidence that I know of—suggests that, in fact, it does. All the firms that are covered under affirmative action—all the Federal contractor firms and establishments—have affirmative action plans that are supposed to contain goals and timetables. At those establishments, minority and female employment has grown faster, and my evidence also suggests that the system of goals and timetables has been an effective tool in achieving that result.

Mr. **Edwards**. Thank you, Mr. Chairman.

Mr. **Martinez**. Thank you, Mr. Edwards.

Mr. Sensenbrenner.

Mr. **Sensenbrenner**. Yes.

Professor Leonard, are you familiar with the work of Thomas Sowell, who is a senior fellow at the Hoover Institution at Stanford University?

Mr. **Leonard**. He writes quite a bit. I'm not familiar with it all, but I'm certainly familiar with some of it.

Mr. **Sensenbrenner**. I have before me an article which he wrote that appeared in the New York Times of July 28, 1980, entitled "Affirmative Action Harms The Disadvantaged." Let me just quote two of the points that he makes and ask you to comment on them.

He says, "Before the goals and timetables were mandated by Federal guidelines in 1971, Puerto Rican family income was 60 percent of the national average; today, it's 50 percent." This was in 1981; it's not 1985. "Black family income as a percentage of white family income has never in the past decade exceeded the level that it reached in 1969. Usually it has been lower."

So the first point that Mr. Sowell makes is that affirmative action hasn't worked if you look at the bottom line in terms of increasing the family income of the minority groups that it's supposed to be helping.

The second point that Sowell makes is that we have added so many groups to those that are protected by affirmative action programs that those groups that are really at the bottom of the socioeconomic ladder in the United States are lost in a sea of other protected groups, and he quotes George Gilder in his bestseller, "Wealth and Poverty," who estimates that the people who are protected by affirmative action programs with goals and timetables cover 70 percent of the population, controlling 75 percent of the country's wealth.

Sowell says this means that blacks, for example, are lost in a sea of other people, and they really do not have the employment opportunities that the goals and timetables were intended to provide them being available, since there are so many other people that are covered under the goals and timetables.

Would you care to comment on both of these points that Sowell has made?

I'd also like to ask unanimous consent to insert the Sowell article in the New York Times in the record, just so that it's complete.

Mr. **MARTINEZ**. Is there any objection?

[No response.]

Mr. **MARTINEZ**. If not, it is so ordered.

[The article follows:]

From the New York Times, July 28, 1980.

AFFIRMATIVE ACTION HARMS THE DISADVANTAGED

(By Thomas Sowell)

The supreme irony of "affirmative action" is that it demands hard statistical results from others but has none to offer itself. This is the tenth year of numerical "goals and timetables" in employment—quotas, for those who prefer plain English. Yet the actual results of a decade of this controversial program are seldom mentioned.

Before "goals and timetables" were mandated by federal guidelines in 1971, Puerto Rican family income was 60 percent of the national average. Today it is 50 percent. Black family income, as a percentage of white family income, has never in the past decade exceeded the level reached in 1969. Usually, it has been lower.

No doubt there are many factors behind these numbers. But imagine an employer with similar statistical trends trying to explain to EEOC or the courts that it was all due to other circumstances beyond his control. Yet that is what affirmative action proponents are reduced to. The results simply are not there to justify this bitterly divisive program.

Progress has not stopped completely for disadvantaged racial and ethnic groups. But the rate of progress is not as rapid as it was in the equal opportunity phase of the 1960s that preceded affirmative action quotas in the 1970s. Indeed, some proponents of affirmative action cite the slowing down of progress as a reason that this program is needed more than ever.

There are economic as well as statistical reasons for considering affirmative action counterproductive. The incentives created by quota pressures seem to increase the demand for "representatives" of the various groups designated by the government for special consideration. But at the very same time, these pressures make it more dangerous to have such people on the payroll.

Their future pay, promotion, and discharge patterns can easily land the employer in costly legal proceedings, even if he ends up completely vindicated. But the plight of employers is not the central issue. The real problem is that disadvantaged groups can be damaged by the way employers seek to protect themselves.

One way out of the employer's dilemma is to hire minority applicants who are sufficiently above average that their future pay, promotions and discharge patterns are unlikely to be worse than those of the other employes. But while the demand for these unusually well-qualified individuals tends to be increased by affirmative action pressures, the demand is decreased for minority or female applicants who are below average, or who do not have enough of a track record for an employer to take a chance.

Some recently published data on black males illustrates the point. Between 1967 and 1978, the income of college-educated black males rose dramatically, both absolutely and relative to the income of college-educated white males. In 1967, college-educated black males who were in the labor force a few years earned 74 percent of the annual income of their white counterparts. By 1978, this was 98 percent.

But over exactly the same span of time, black males with less education were falling further behind white males with less education. For example, black males who were in the labor force a few years, but who had less than 12 years of schooling, earned 79 percent of the annual income of white males of the same description in 1967. By 1978, that was down to 69 percent.

One may try to explain over-all black/white ratio changes by general economic conditions in the 1970s, rather than by affirmative action. But it is hard to explain diametrically opposite trends among blacks this way.

A more narrowly focused study of 50,000 academics showed a very similar pattern. Those black faculty members who had completed their Ph.D.s in highly ranked departments and who had published were earning more than whites of the same high qualifications. But those black faculty members who had not yet completed their doctorates and had not yet published earned less than their white counterparts. Again, the demand seems to have been artificially increased for the highly qualified black and artificially decreased for the more average black or the black who had not yet made a track record.

A number of responsible people have said off the record that they are reluctant to take on risks, with either minority or female applicants, because of the time and money that can be lost in legal proceedings if they later have to be discharged or even promoted more slowly. One black woman in a high position, when informed of this reasoning, replied that that was how she herself operated in considering applicants. "I have no time to spend at EEOC or in the courts," she said.

Affirmative action harms disadvantage groups in other ways. The number of groups covered by this program has successively expanded to the point where it now includes a majority of the American people. George Gilder in his best seller "Wealth and Poverty" estimates the coverage at 70 percent of the population, controlling 75 percent of the country's wealth.

This means that blacks, for example, are lost in a sea of other people. Moreover by requiring employment decisions to be justifiable to third parties, affirmative action increases the importance of paper credentials—which are disproportionately lacking among disadvantaged minority individuals, even when they are perfectly capable of doing the work.

Like many other public policies, affirmative action needs to be judged by what it actually does, not by what it intends or hopes to accomplish. The crucial question is what incentives and constraints it creates—what it rewards and penalizes. We all know what road is paved with good intentions.

Even the supporters of affirmative action seem to sense its bankruptcy. They generally steer discussions as far away as possible from hard facts about the actual results achieved. They talk instead about history, as if this policy were going to be applied to the past instead of to the future. They impugn the motives of those who criticize their efforts, in a manner reminiscent of Sen. Joe McCarthy. In short, anything to evade the grim facts.

Quotas and preferences have been tried in a number of countries. Nowhere has any racial or ethnic group risen from poverty to prosperity by these methods, though many have done so by all sorts of other methods. The Chinese in Southeast Asia, Italians in Argentina, Germans in Brazil, Japanese in the United States, and Jews in various European countries have begun in poverty and ended in affluence, while avoiding politics. Where preferential treatment has been tried, it has not merely failed to achieve its object but has torn countries apart with internal strife. India, Indonesia, Malaysia and Guyana are just some of the places where such efforts have led to bloodshed in the streets.

After 10 years, it is time to ask what affirmative action has achieved for the disadvantaged, and what it has done to this country.

(Mr. Sowell is a Senior Fellow at the Hoover Institution.)

Mr. **Leonard**. I think you are looking at the wrong bottom line. The idea that affirmative action is supposed to cure all the ills of all minorities and women—I think that's putting too heavy a burden on one small program.

To my eyes, affirmative action was a program that was designed to attempt to remedy employment discrimination. If you look at what has happened in the employment field, the evidence is that black, minority, female employment has grown faster where you have affirmative action than where you haven't.

It is certainly true that it has not solved all the problems of blacks. I don't think it was intended to.

The statistics you refer to are relatively simple statistics. They don't correct for the business cycle. Over that period, we have a growing recession. Recessions have always impacted on minorities, black in particular—worse.

Mr. **Sensenbrenner**. Well, again, I would dispute, that, because the figures that were utilized by Mr. Sowell were 71 for Puerto Ricans and 69 for blacks. That was when the war in Vietnam was going good and so was the economy as a result of that.

The end line was in 1981, which was before the beginning of the recession of 1982 and 1983, and I assume that Sowell had to use statistics that were at least a year older, because it takes the Labor Department that long to crank them through the computer.

So it seems to me that we were either at the top or close to the top of business cycles when both of the figures were assembled that Sowell used in the study.

Mr. **Leonard**. I'm not sure about that. There are, obviously, other things that have gone on, in particular the breakup of the black family. Since I don't have those statistics in front of me, I really can't speak to them directly, although I would argue that that's the wrong bottom line, that you are asking too much of affirmative action if you want it to correct all those problems.

I would stress again that if you compare the plants and the companies in this country that have affirmative action programs with those that don't, the ones that have affirmative action programs have increased their employment of minorities and females more than others.

If you look at the income of employed blacks, you will see that it has gone up faster since Title VII and affirmative action programs have come into play than before.

We still do have a serious social problem of unemployed blacks and blacks out of the labor force. In part, that's a puzzle, and I wish I knew the answer to why that was happening.

As to your second question, you have the groups playing off against each other. Yes, it's true, over time more groups have come under the heading of affirmative action protection. I think you can see that in a positive light that, in fact, firms are increasing the pool of employees they are looking at even more.

So I suppose a nice political way to kill affirmative action would be to go the next step and extend it to white males, if you thought of it as a preferential program. If you thought of it as simply a program that was trying to encourage employers to rationalize their employment selection process and draw from a larger pool, then I don't think there is competition between these groups.

Mr. Sensenbrenner. Thank you.

Mr. Martinez. Thank you.

Mr. Hawkins.

Mr. Hawkins. Just two questions.

I'm always amused at individuals quoting Mr. Sowell. It's a peculiar thing that white America today delights in quoting a black professor at Stanford University, who would not be at Stanford if it had not been for affirmative action. Mr. Sowell would be in a black institution down in the South if affirmative action had not operated to give him a comfortable position at Stanford. I think he's a very able man, but I think his statements sometimes are very misleading.

The biggest decline in the median income of blacks has come under the last two recessions, one in 1980, which was under the previous administration, and one in 1981-82 under this administration.

So to say that affirmative action was responsible for these recessions and the heavy decline in the median income of blacks, I think, is a little misleading even for a professor at a very prestigious institution such as Stanford.

Mr. Leonard, I do want to ask you a question concerning your study which was quoted in the Special Analysis J of the President's budget for fiscal year 1986. I understand you made an accurate and balanced analysis about affirmative action, but you did not mention it, I think, in your statement. Am I correct?

Mr. Leonard. Special Analysis J cites extensively from my work, and I would say, since it's citing from a 400-page paper, you can find critical things I've said about affirmative action, and you can find more positive things I've said about affirmative action. I think the quotations from my work in Special Analysis J select more heavily from the critical comments. In that way, I would say it gives not a very balanced view of my own work.

Mr. Hawkins. Is that the extent of your statement?

Mr. Leonard. Yes, sir.

Mr. Hawkins. There is one part of your testimony which I think is very significant. With respect to the success of affirmative action in the climate of vigorous economic growth as compared with a period of decline—keeping in mind that over the last several years the economic growth rate has been less than 3 percent—the number of job opportunities made available not only to blacks but to whites as well is substantially lower. Assuming that the economy was operating at full capacity and that we have a vigorous, growing economy—one which is not restricted as under current economy policies—what would be the impact on this then of individuals competing for jobs?

Would it not then be possible for blacks, as well as other minorities and women, to obtain the opportunities they need without transferring jobs from one group to the other, and would it not take pressure off such actions as so-called reverse discrimination?

In other words, it would not be necessary, under those conditions, then to take a job away from someone else and no one else would feel threatened by applying the concept of equality to all groups.

So would it not be much easier then to accomplish the objectives without all of the frictions that we now have, and wouldn't most of the problems melt away so that everyone would have opportunities to be upgraded and we would not then be fighting for too few jobs?

Would you not think that under those conditions those who oppose affirmative action would be better served to support economic policies that made opportunities available for more people and, in that way, use up their wonderful energy in a more constructive fashion?

Mr. LEONARD. I think that would be a very wise policy. I think you'd be hard put to find somebody who was not in favor of economic growth. Economic growth in the past has been, as I said, the single most important policy for providing opportunities to move minorities and females into the labor force.

Obviously, it's much easier to split up a growing pie than a shrinking one. If you look at the firms that have had employment growth, they have been able to increase minority and female employment along with increases in white male employment. So it's not a negative sum gain, not one person's gain is another person's loss, and there is a lot less conflict.

I might say that the headlines about the conflict between, for example, union seniority systems and affirmative action, I think, give a distorted view of that. Those are the stories that make the headlines, but I think it's a very distorted view of what is actually happening in most institutions with a seniority system, and particularly most union situations.

If you look at, for example, Mr. Edwards' district in California—manufacturing—and compare the unionized sector with the nonunionized sector, you will see that the unionized sector has just as good a record on minority and female employment as does the nonunion sector.

So I think you are certainly correct in saying that economic growth is a very good policy for increasing everybody's employment and, in particular, some of the more disadvantaged and previously discriminated against members of our society.

Mr. HAWKINS. Thank you.

Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Hawkins.

Mr. Dannemeyer.

Mr. DANNEMEYER. Thank you, Mr. Chairman.

I appreciate your suggestions about economic growth. Since you are a Californian and I am a Californian and we have three other Californians on the panel here, I'd like to ask you, do you support offshore drilling in California as a means of providing employment opportunities for the unemployed in our State?

Mr. LEONARD. I'm afraid I don't see the connection.

Mr. DANNEMEYER. Do you understand the question?

Mr. LEONARD. No; frankly, I don't. I don't understand the connection between that—there are a number of ways of getting economic growth.

Mr. DANNEMEYER. I'm asking you, do you support offshore drilling in California as a means of providing employment opportunities for the unemployed?

Mr. LEONARD. I'm not an expert on offshore drilling, but one thing I do know about it is, it's pretty capital intensive, and there aren't a whole lot of people working out there. So if you want to throw money at something, I wouldn't throw it at offshore drilling.

Mr. Dannemeyer. If you were convinced, or if the evidence disclosed, that it provides jobs for the unemployed, would you support it?

Mr. Leonard. I suspect you could find better things to throw money at that don't require such specialized skills and that have a higher labor-capital ratio if you really want to generate jobs, but I think it's not really a question of targeting it towards any one industry, I think it's a question of economic growth, which I suspect is something you are also in favor of.

Mr. Dannemeyer. I'm a little surprised at your reluctance to support an economic activity in our home State which would provide jobs to the unemployed.

I have another question I'd like to ask you.

I know of a firm in southern California that employs close to 1,000 people, and their sales are in excess of the minimum required for being under the supervision or aegis of the Title VII law as implemented by regulations.

In this instance, this firm has a majority of minorities working there. What do you suggest we do about that? Do we stop hiring minorities in that firm until the nonminorities come up to their rightful percentage?

Mr. Leonard. What's the problem?

Mr. Dannemeyer. I think the thrust of affirmative action, if I understand your observations, is that we need it as a means of providing employment opportunities for minorities as you define them. Is that right?

Mr. Leonard. Where there is a history of discrimination, I think it's a useful policy.

Mr. Dannemeyer. And the case that I have postulated for your consideration is one that I am familiar with in southern California where, as I say, minorities comprise a majority of the working population of this particular company.

Now, with that particular company, do you suggest we stop hiring minorities, as you define them, so as to give the nonminorities an opportunity for employment opportunities to achieve their rightful percentage?

Mr. Leonard. I think there are some women who would probably be in favor of that sort of thing. I think also one of the points I was trying to make is, if you look at—one of my criticisms of how the OFCCP has targeted pressure in the past is that in many cases they keep going after establishments that have more than average minority or female employment, and I think that sort of targeting could be improved by, instead of going after the ones who already have good records, putting more pressure on those firms with poor records. I don't think there is much to be gained by bothering people who already have very good records in this area

Mr. Martinez. Would the gentleman yield for a question?

Mr. Dannemeyer. I'd be happy to yield

Mr. Martinez. This firm that you are talking about—where is it?

Mr. Dannemeyer. It's located in the City of Industry.

Mr. MARTINEZ. What is the predominant minority group there—black or Hispanic?

Mr. DANNEMEYER. It's Hispanic.

Mr. MARTINEZ. What is the majority of the population in the City of Industry?

Mr. DANNEMEYER. In the City of Industry, I don't think they have more than 100 people.

Mr. MARTINEZ. The City of Industry? You are thinking about the city of Vernon.

Mr. DANNEMEYER. In the cities that surround the City of Industry, I would guess that there is probably an even mixture between Hispanics and non-Hispanics.

Mr. MARTINEZ. In that particular district, there is 57 percent Hispanic population.

So I would say that if you are talking about affirmative action in the context of goals and guidelines and you are talking about the surrounding area and the workforce available, you are not too far off in the number of employees that are hired there from the percentages around it.

Mr. DANNEMEYER. I just would like to have the observations from this witness, but I'm not sure this witness wanted to respond to my question.

I yield back the balance of my time.

Mr. MARTINEZ. Thank you.

Not to leave it hanging like that, let me ask a question. Would you be able to answer a question like that without knowing all of the facts?

One of the questions that I just asked is, what is the makeup of the geographic area around it as far as ethnic representation? What kind of work do they do, and what are the policies of the company itself?

Mr. LEONARD. You just outlined the standard Title VII case, which is, what does the relevant labor pool look like, and you would want to compare what happens, as happens under Title VII and often happens under affirmative action. You have a comparison of what happens inside the plant with what the people who are applying for jobs in the relevant labor pool for that position based on the geography, skills, and interest in the job. That's how Title VII works. That is, I think, how affirmative action often works and, if it doesn't, how it should work.

Mr. MARTINEZ. Thank you very much for joining us today, Mr. Leonard. We appreciate your testimony.

Mr. LEONARD. Thank you.

Mr. MARTINEZ. Our next witness is the Honorable Mickey Leland from Texas.

Mr. Leland, if you have a prepared text, it will be entered into the record in its entirety.

TESTIMONY OF HON. MICKEY LELAND, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. LELAND. I understand, Mr. Chairman. Thank you very much.

I wish all of you a good morning. It is, one more time, great to be in the presence of Mr. Dannemeyer, whom I've had the pleasure of serving with on the same committee since we have been in Congress, I guess.

Mr. **Hawkins**. What about the rest of us? [Laughter.]

Mr. **Leland**. I'm sorry that you have been condemned to that destiny.

I want to thank you, Mr. Chairman and the members of the subcommittee, for inviting me here today to discuss the equal employment opportunity provisions of H.R. 4103, the Cable Communications Policy Act of 1984. I'd like to also, Mr. Chairman, apprise the committees that I, too, am here representing the Congressional Black Caucus as its Chair.

As a member of the House Subcommittee on Telecommunications, Consumer Protection, and Finance, I have long been concerned with the level of representation of women and minorities in the electronic media.

Last Congress, during the Telecommunications Subcommittee's consideration of the Cable Act, I introduced an amendment codifying equal employment opportunity standards for cable system operators.

The amendment and the bill passed the subcommittee, the Energy and Commerce full Committee and the House of Representatives overwhelmingly. The equal employment opportunity provisions of the Cable Act are of historic significance.

At a time when civil and employment rights are under attack, its passage last year demonstrated that the principle of affirmative action is a viable and productive policy for creating and maintaining equal employment opportunity for all Americans.

Moreover, the EEO language in the cable bill is the result of a compromise reached with the National Cable Television Association, the principal trade association representing the cable industry.

As far as I can determine, passage of the Cable Act marked the first time any trade association has willingly accepted the codification of meaningful EEO standards.

For almost 15 years, the Federal Communications Commission has required all broadcast licensees and cable systems operators to submit annual employment reports detailing the number and job classifications of racial minority and female employees and to engage in affirmative action employment plans to recruit, train, and promote minority and women personnel.

The EEO provisions of the Cable Act codified and strengthened the FCC's regulations. Under the act, cable operators are required to provide the FCC with annual reports containing statistical data on employee gender and race. The FCC is authorized to investigate and conduct onsite audits of cable operations and to withhold EEO certification of noncomplying firms.

Further, Mr. Chairman, the FCC is empowered to apply sanctions against offending cable operators, including forfeitures of $200 per violation per day and possible suspension of the cable operator's license.

The FCC also is authorized under the statute to receive discrimination complaints from cable firm employees and job applicants.

Although the Cable Act holds great promise for fair employment of minorities and women in the cable industry, that promise will only be realized if the FCC effectively and forcefully implements the new law.

The FCC is now engaged in a rulemaking to implement the EEO provisions of the Cable Act, and many of the usual opponents of affirmative action and increased opportunities for women and minorities are crawling out of the woodwork, seeking to undermine the intent of the legislation.

What is particularly galling is that the Civil Rights Commission and the Department of Justice, the organizations with proud histories in the struggle for civil rights, are in the forefront of current efforts to deny or limit equality of employment opportunity.

Some parties offering comments in the proceeding have argued that, since the bill that ultimately passed the full Congress did not include certain House-passed provisions which contained numerical percentages—and this is particularly important—this evidence of a legislative intent to prohibit the use of numerical processing guidelines by the FCC in carrying out its EEO function.

Let me state firmly, Mr. Chairman and my colleagues, as the author of the legislation, that there was no such legislative intent. Let me repeat. There was no such legislative intent.

I am far from certain that the FCC's current processing guidelines are adequate as a means of achieving affirmative action goals, but neither I nor any party in the final compromise on the Cable Act intended to disturb the FCC's use of the processing guidelines as an objective administrative tool for monitoring EEO compliance.

In fact, Mr. Chairman, all of the parties to the final compromise—and I mean all of the parties—of the EEO provision understood and anticipated that, under the legislation, the commission would be permitted to continue to utilize numerical processing guidelines in monitoring cable industry EEO compliance.

Moreover, my agreement to delete the numerical requirements from the compromise bill turned on my belief that doing so would afford the FCC greater flexibility to increase the parity requirements at some later date.

In the past, citing changed circumstances, the FCC has increased its parity requirements. Had parity requirements been retained in the final bill, in the future it would take an act of Congress to increase the requirements.

Some critics have argued that the processing guidelines are constitutionally impermissible quotas. Although I do not believe that quotas are constitutionally impermissible, the processing guidelines are certainly not quotas.

The FCC uses the processing guidelines as a screening device to aid its certification process. These guidelines, which have been upheld by the courts, establish a zone of reasonableness used in comparing an employer's minority and female hiring record with the presence of these groups in the local labor force. They are simply an objective administrative tool by which the FCC can make an initial determination whether an employees' EEO program has resulted in the hiring of minorities and women.

Let me stress, Mr. Chairman, that a failure to meet the guidelines is not and, in my opinion, should not be, in and of itself, a violation of the EEO requirements. Nor should a cable system operator be given a clean bill of health by the FCC where he or she meets the guidelines but is otherwise in violation of the requirements of the EEO provisions.

But the FCC's ability to enforce EEO turn on its ability to effectively monitor and screen cable system operators. The processing guidelines are the most effective tool for such efforts.

In many ways, Mr. Chairman, the EEO provisions in the Cable Act are model legislation. They offer strong and comprehensive policy for equity in employment in the cable industry and represent a recognition by the cable industry that fair employment of minorities and women is in the industry's best interests and of course in the Nation's best interests.

Still, Mr. Chairman, the naysayers and demogogues and professional bigots seek to continue to turn back the hands of time. Progress for women and minorities in the cable industry and in America turns on tough and effective regulation and enforcement. History proves that point. If we are to build a fairer nation where all Americans have true equality of opportunity, we must continue to pass strong, tough, progressive legislation, and we must monitor closely the activities of the agencies charged with enforcing those laws.

I will be watching the FCC closely as it develops the regulations pursuant to the Cable Act, and I know you will, too.

Mr. Chairman, just a generic statement, if I may. I believe that affirmative action is absolutely necessary in order to effect the positive and constructive change that is necessary to afford the opportunities for women and minorities to assume first-class citizenship in this country. It is time for us now to expect it. It should not be time for us to demand it.

Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Congressman Leland.

In one of your last statements, you mentioned that this is a model. Do you think this is an important and successful model, one so important and successful that it ought to be adopted by all Federal agencies?

Mr. LELAND. Absolutely, Mr. Chairman.

Unfortunately, we don't know how successful it is yet, since the rulemaking is still in effect, and we have not seen the results of the legislation.

But I will tell you that the legislation itself, serving as a model, I think, does indeed need to be used by all of the agencies.

I've had several agencies come before the committees on which I serve, and all of them have talked about reversing affirmative action and not using minorities and quotas and goals to seek opportunities for them in employment.

I've heard the excuse that we ought to protect individuals, to whatever length it takes, as opposed to groups, and that kind of thing, and I will tell you that, coming together with Senators like Senator Orrin Hatch, who, as a matter of fact, worked with me on this compromise, was a rewarding experience, because he expressed to me his desire to see that ethnic minorities and women be treated fairly, particularly in this industry.

But I think that this industry is only one industry that needs to have the kind of principles laid out before that this legislation presents.

Mr. MARTINEZ. Let me hear again what your response would be if the Federal Communications Commission were to implement new guidelines and drop the numerical percentages to alter the current guidelines.

Mr. LELAND. I would be upset and very disappointed. I know that the FCC commissioners knew and know what the intent of the legislation was and they also understood that numerical requirements would at least establish a good floor and give them—without the numerical requirements in the legislation, would have given them a greater flexibility to determine in the future whether or not they needed to increase, not to reduce, the numerical requirements in this legislation or in the rulemaking.

Mr. MARTINEZ. Several of the commissioners have expressed their belief that the processing guidelines are unconstitutional. What is your response to that view?

Mr. LELAND. We have had constitutional lawyers to go over these guidelines, and they have not come up with any kind of rationalization even that these guidelines would be unconstitutional. They have told me that they don't see how they could be proved to be unconstitutional.

Mr. MARTINEZ. Thank you, Mr. Leland.

Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman, and my compliments to the gentleman from Texas and the very distinguished chairman of the Congressional Black Caucus.

I'm particularly grateful to Congressman Leland and the Black Caucus for the assistance that they are giving us in our attempts to enact H.R. 700, the Civil Rights Restoration Act of 1985, which is undoubtedly the most important civil rights bill to come before Congress in this decade. It compares in importance with the Voting Rights Extension Act of 1982, which, I might add, is also under assault by the Department of Justice insofar as section 2 is concerned, along with affirmative action, and along with their opposition to H.R. 700, the Grove City bill.

So the work that you described this morning, Mr. Leland, is very, very helpful to us who worry on a day-to-day basis about civil rights and fair treatment in the United States.

Again, I bring you thanks for the massive help that you and your organization are giving to us on this very, very important civil rights bill.

Mr. LELAND. I must say that the Congressional Black Caucus is most proud to identify itself with you, Mr. Chairman, who has been a leader in the area of civil and human rights in the Congress. We appreciate and respect you for that.

Mr. EDWARDS. Thank you.

Mr. MARTINEZ. Thank you, Mr. Edwards.

Mr. Sensenbrenner.

Mr. SENSENBRENNER. Yes. Thank you very much.

You didn't submit a written statement, but if I heard you correctly, Mr. Leland, you labeled the opponents of affirmative action naysayers, demagogues, and professional bigots.

Do you think that Morris Abram, who is presently a Civil Rights Commissioner and who marched with Martin Luther King 20 years ago, is a naysayer, demagogue, or professional bigot?

Mr. LELAND. I talked about the opponents to affirmative action.

Mr. SENSENBRENNER. He is a strong opponent of affirmative action as it relates to quotas and a very articulate one.

Mr. LELAND. First of all, Mr. Sensenbrenner, I don't think that people who marched with Dr. King in the past necessarily qualify to be civil rights activists today. You must understand that.

I marched also. I have been put in jail. I have suffered the atrocities of racism and bigotry all my life. So I qualify today, when I sit before you, to put forward my opinion about those people who are in opposition to struggles of minorities and women to gain an equal place in this America.

So if the shoe——

Mr. SENSENBRENNER. Would you answer my question, please? Is Mr. Abram one of those people?

Mr. LELAND. If the shoe fits, they have to wear it.

Mr. SENSENBRENNER. So you believe that he is a naysayer, demagogue, or professional bigot?

Mr. LELAND. I qualified my statement, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Well, I asked you if you thought he was. Can you answer it yes or no?

Mr. LELAND. If the shoe fits, he'll have to wear it.

Mr. SENSENBRENNER. OK. Let me ask you one other question.

I have always thought that one of the purposes of the civil rights laws—and I believe that I have been constructive in developing civil rights laws in the 6½ years that I have served on this subcommittee. the last 4 as the ranking minority member—was to establish a multiracial society so that people of different races and ethnic backgrounds living and working side by side with each other would be able to overcome some of the inherent racism which has, unfortunately, developed in the history of this country.

Several months ago in testimony before a subcommittee in the other body, Nathan Derschowitz of the American Jewish Congress said,

> When an applicant is turned down not because of his or her own relative lack of qualifications but because of membership in the wrong class or group, racial resentment is inevitable. This cannot be easily explained away by reference to the principle of racial neutrality because, in fact, no neutrality is at work.

Do you agree that the above resentment exists?

Mr. LELAND. I'm not sure, Mr. Sensenbrenner, that—yes, I am sure that the resentment exists; yes, I am.

Mr. SENSENBRENNER. Then how do we achieve our goal of an interracial society in getting rid of institutional racism by building resentment through laws that do have quotas and goals and timetables?

Mr. LELAND. Sometimes goals, timetables, and affirmative action itself does cause some pain, Mr. Sensenbrenner, but sometimes we have to suffer pain to advance our society to where it ought to be.

It was painful for my people to be slaves in this country. It was painful for us to be denied equal access to educational institutions in this country. It was painful for me to have to wait for years to run for a political office or to see my people have the opportunity to run for political office. Until 1965, there was no real opportunity in the South for blacks and other ethnic minorities to assume their proper representation in the houses of the legislatures, on city

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councils, on county commissioners' courts, and in the U.S. Congress, for that matter. It has been painful for us.

It is painful for me to sit here in the U.S. Congress in 1985 and have to come here and fight to be an equal citizen or to at least advance the cause for my constituents as well as the constituents of this country to be equal citizens.

So in progress there is pain.

Mr. **SENSENBRENNER**. But nondiscrimination in public accommodations, nondiscrimination in voting rights, nondiscrimination in access to education, access to promotions, access to equal employment opportunity is a heck of a lot different than saying to someone that they don't get a job because a less qualified person belongs to a specific racial group.

Mr. **LELAND**. Nobody is asking for less qualified people to be advanced to a position of employment, Mr. Sensenbrenner.

Mr. **SENSENBRENNER**. That's the effect of a lot of these laws.

Mr. **LELAND**. That is not the effect.

Mr. **SENSENBRENNER**. It certainly is.

Mr. **LELAND**. Since when?

We have people who are as intelligent as the most intelligent Member of this Congress who are women and minorities in this country. They have applied for jobs and have been denied because they are women and they are minorities. That's unfair.

Mr. **SENSENBRENNER**. Sure, it's unfair.

Mr. **LELAND**. It causes incredible pain, and they have been denied as groups of people.

Mr. **SENSENBRENNER**. Sure, it's unfair, Mr. Leland, but, on the other hand, if we have a case where there is an actual quota, that means that a less qualified applicant gets the job over a more qualified applicant.

Mr. **LELAND**. That is not true, Mr. Sensenbrenner because——

Mr. **SENSENBRENNER**. It certainly is true.

Mr. **LELAND** [continuing]. For any given job today——

Mr. **MARTINEZ**. Let's cool our tempers a little bit.

Would the gentleman yield for a question?

Mr. **SENSENBRENNER**. No. I would just like to make one further point.

I think that Title VII and the 14th and 15th amendments to the Constitution are supposed to be colorblind. If they are supposed to be colorblind, then we go back to the provisions in the Declaration of Independence that all men were created equal.

Mr. **LELAND**. That's the problem, Mr. Sensenbrenner—all men were created equal—when, in the Constitution, black people were three-fourths of a human being and women were not recognized at all.

Mr. **SENSENBRENNER**. And, sir, my ancestors fought a civil war against the South to make sure that you did have your equal rights.

If you look historically, my State tried to secede from the Union in 1857 because slavery was permissible. Cooler heads prevailed, and we led the fight against the South in the Civil War.

Mr. **LELAND**. Let me tell you, Mr. Sensenbrenner, we appreciate you and John Brown. [Laughter.]

Mr. Sensenbrenner. And I think if you look at people who have served from my State in the Congress of the United States all throughout the civil rights struggles, they were very firmly in support of nondiscriminatory legislation when that wasn't so popular.

Mr. Leland. But Mr. Sensenbrenner, we're talking about 1985 now. There is a Justice Department over there that is trying to reverse all of those things that your ancestors fought for, and I'm asking you to join with me today and fight for the equality of human beings in this country.

Mr. Sensenbrenner. If my colleague will look at the record, when Mr. Reynolds appeared before this subcommittee in 1982 on the Voting Rights Act, I told him he was flat wrong in his analysis, and I think that my chairman, Mr. Edwards from California, will state, as he has done in the past, that if it wasn't for me working out a compromise on the Voting Rights Act, the thing never would have passed.

I yield back the balance of my time.

Mr. Edwards. Since my name was mentioned——

Mr. Martinez. Mr. Edwards.

Mr. Edwards. Mr. Sensenbrenner was an immense help on the extension of the Voting Rights Act, and we're looking for that same support for H.R. 700. [Laughter.]

Mr. Leland. Let me say, Mr. Chairman, that——

Mr. Sensenbrenner. Reclaiming my time——

Mr. Martinez. The time of the gentleman has expired.

Mr. Sensenbrenner. I ask for 15 seconds more.

Mr. Martinez. Go ahead.

Mr. Sensenbrenner. Reclaiming my time, I'm looking forward to the two gentlemen from California seated on my far left to bring that bill up on the floor so we can get it passed.

Mr. Edwards. Is that a commitment? No amendments?

Mr. Sensenbrenner. The ones that were adopted in the Education and Labor Committee.

Mr. Edwards. No, I meant no amendments from our committee.

Mr. Sensenbrenner. The amendments that were adopted in the Education and Labor Committee improve the bill. That's why it passed out of Mr. Hawkins' committee 29 to 2 rather than passing out of ours by 21 to 14.

Mr. Martinez. I would like to suggest that this debate take place at the time of the markup.

Mr. Leland.

Mr. Leland. I'd like to say, Mr. Chairman, that I appreciate the gentleman from Wisconsin and what he has done to help in the area of civil rights today, and while my emotions were evoked considerably, I do understand and know that the gentleman has been very helpful to us and want to work with the gentleman, particularly in the area that Mr. Edwards had alluded to.

Mr. Martinez. Mr. Leland, I understand emotions get pretty high, especially when you have been the one that, for years and years, had to struggle to overcome what people now call qualifications. You were denied employment simply because of your background, national origin, or race, rather than really looking at your qualifications. Now it comes easy for some people to say that less qualified people are being promoted.

I don't think there has ever been a time when a qualified person was promoted over a nonqualified person--no, I take that back. There probably has been, but they have constituted a minority of the situations compared to the situations that existed before.

Thank you, Mr. Leland.

Mr. Hawkins.

Mr. Hawkins. I'd like to commend the gentleman from Texas on his work on the Cable Act and the model which he established in that act, and I also would like to just merely comment on his reference to the bipartisan support which he obtained in the Cable Act. I think that illustrates well the history of affirmative action.

I recall that some of us had to go to President Nixon in order to get the affirmative action provision strengthened, and he did respond.

I do recall that Mr. Ford, as a Member of the House, was a very strong supporter of affirmative action, particularly in the construction industry. As President, he strengthened affirmative action and continued his support for the program.

It is amazing to me that now, in 1985, we seem to have reversed the tendency to move ahead in equal opportunity matters under both Republican and Democratic administrations.

I don't have the explanation, I don't know whether the gentleman from Texas has the explanation, but I think it's a very sad day that we, in 1985, have turned our backs on all this progress, but I do commend the gentleman from Texas.

Mr. Leland. Thank you. I appreciate the gentleman's comments.

Mr. Martinez. Mr. Dannemeyer.

Mr. Dannemeyer. Thank you, Mr. Chairman.

My good friend, Mickey, isn't this whole struggle—controversy over affirmative action the difference between the economic status that any of us enjoy when we consider the premise that you and I agree on, equality of opportunity in America for all people—we agree, I think, on that premise.

Mr. Leland. We agree on that, yes, absolutely.

Mr. Dannemeyer. What I perceive is behind the movement of affirmative action and what I suspect is the resentment on the part of a lot of people in this country to its implementation is that it is a struggle not for equality of opportunity but for equality of result.

Mr. Leland. An equality of what, now?

Mr. Dannemeyer. Equality of result. We are all equal at the starting line, but it is perceived by a lot of people, in my opinion, that what is behind the movement for affirmative action is to assure, by force of law, equality of result in the economic marketplace of our society. That's what this whole struggle is all about.

Believe me, sir, we all agree on equality of opportunity, and if we can stick to that premise, we are going to have a better society; but so long as we seek to use the force of law to achieve equality of result for any of us, we are going to have strife, and trouble, and dissension, and tension, and conflicts, and I just want to share that with you.

Mr. Leland. Mr. Dannemeyer, let me assure you that the campaign that we are in is a campaign for equality. We feel very strongly that affirmative action is the most invaluable tool to achieve that equality.

Mr. DANNEMEYER. I respect your observation, but I'm just suggesting that what you are really dealing with is changing the basic premise from equality of opportunity to equality of result.

Mr. LELAND. How do you arrive at that conclusion, though, Mr. Dannemeyer? Tell me, what do you put in its place? How do you solve the problem of racism and bigotry in America?

Mr. DANNEMEYER. I really believe that what has happened in the civil rights movement in this country since 1965 is that many of us in our country heard the battle cry for achievement of civil rights, and it raised the conscious level of the American people to the point where we succeeded in having the laws adopted that prohibited discrimination and public accommodation, in housing, and job opportunities.

But the reality of life came home to all of us that being equal at the starting gate in life didn't give any of us an economic stake in anything, it just gave us a chance, and there's a gentleman that has written a book about this whole business since 1965——

Mr. LELAND. John Birch. [Laughter.]

Mr. DANNEMEYER. No. Maybe you have read his material, I haven't.

Mr. LELAND. I have.

Mr. DANNEMEYER. There is a fellow named Charles Murray.

Mr. LELAND. I read both sides, Mr. Dannemeyer.

Mr. DANNEMEYER. Have you read Charles Murray's book, "Losing Ground"?

Mr. LELAND. No.

Mr. DANNEMEYER. I would commend it to you for consideration, because this is the theme the gentleman has advanced. It is the most critical, devastating indictment of the fallacy of the liberal welfare state that I have seen.

Mr. LELAND. Mr. Dannemeyer, we are not talking about our liberal welfare state. Black people, Hispanics, Native Americans, Asian Americans, and women are not looking for handouts, they are looking for a helping hand.

Let me give you an analogy. A friend of mine years ago, who is a comedian—Dick Gregory—said, when the liberals were saying to blacks—particularly black people—"We want to help you pull yourselves up by your boostraps," Dick Gregory said, "How the hell can you help us pull ourselves up by our bootstraps when we ain't got no boots?"

I take it a little further in 1985, and I say to you, Mr. Dannemeyer, we don't want boots; we don't want you to give us boots; what we want to do is build boot manufacturing companies. We'll make the boots for us, and we'll sell you some, too. That's what we are trying to do here. All we want is the access to the resources that you've had access to for years and years and years—centuries, if you will.

Mr. DANNEMEYER. I'd like to ask you a question, Mr. Leland, to see if you agree with this. Civil rights laws were not passed to give civil rights protection to all Americans, as the majority of this commission—meaning the Civil Rights Commission—seemed to believe. Do you agree with that statement?

Mr. LELAND. That civil rights——

Mr. DANNEMEYER. Did you get it?

Mr. LELAND. I believe that the civil rights laws that were passed were passed for all people.

Mr. DANNEMEYER. I'm glad to hear you say that.

Mr. LELAND. Absolutely.

By the way, Mr. Dannemeyer, I fight as hard for the rights of white people as I do for anybody else.

Mr. DANNEMEYER. Thank you very much.

Mr. LELAND. My district is, by the way, a third black, a third Hispanic, and a third white.

Mr. DANNEMEYER. I'm delighted to hear you say that. Thank you.

Mr. LELAND. It's wonderful. I like white people, too. [Laughter.]

Mr. MARTINEZ. Thank you, Mr. Dannemeyer.

One of the things that I have to comment on that Mr. Dannemeyer brought up is, that somebody is going to be denied because you remove the denial of other people. I don't really see how it works that way.

I think that when you make sure that nobody is denied—then everybody benefits by that—everyone.

Let me tell you something that has been very apparent to me, especially in my district. It's not only the Hispanic and the black and the Asian who need help. There are a lot of low socioeconomic white people in that district that need help, too, and when we act up here on anything that tries to make all discrimination go away, they are benefitted also. People sometimes think that people are only discriminated against because of national origin or race. Sometimes people are discriminated against because of age, sometimes because of gender, sometimes because of their looks—just looks.

So, when we pass laws like this—affirmative action plans—we are just trying to establish for certain companies a vehicle in which those who have been discriminated against are given the opportunity to gain employment. Requiring a company to set a goal or a guideline does not constitute setting a quota at all, and it's not saying you must hire *x* number of, but it's giving you something to shoot for, and I don't see how anybody can find offense in that.

Mr. LELAND. Mr. Chairman, it's also amazing to me that, historically, we have found evidence that when companies would hire white people, they wouldn't hold the white people up to the same standard that they would hold minorities up to, and that's the fallacy and the rationalization that affirmative action is discriminating against white people and it doesn't provide for the same kind of qualifications, that we are asking for less than the most skilled or the most qualified people.

The fact of the matter is, historically—and I say this to my colleagues in the Republican Party as well as my white colleagues who might not understand why we fight so hard for affirmative action. We have lost literally millions of brilliant minds of young Hispanics, women, blacks, Asian Americans, Pacific Americans, Indian Americans. We have lost them, without having the experience of their contribution to help to make this country a better place to live.

What we are saying today is that, in 1985, let's start from here to give at least the descendants of those blacks and Hispanics and Asians and Pacific Americans—the ethnic minorities—and women of this country—let's give them an opportunity to contribute to America, to be productive and contributing citizens of this country. That's all we are asking.

Mr. Martinez. Thank you very much, Mr. Leland.

Mr. Leland. Thank you, Mr. Chairman.

Mr. Martinez. We have joining us, a little late but always welcome, Mr. Conyers.

Mr. Martinez. Our next witness is Cynthia Marano.

Is that right?

Ms. Marano. Yes.

Mr. Martinez. I thought I was going to mess that one up. I have a tendency to pronounce any Latin-sounding name with an Hispanic sound.

Ms. Marano. It sounds very nice, Mr. Martinez.

Mr. Martinez. Thank you. Would you proceed?

Ms. Marano. Yes.

TESTIMONY OF CYNTHIA MARANO, EXECUTIVE DIRECTOR, WIDER OPPORTUNITIES FOR WOMEN

Ms. Marano. I want to thank the subcommittees for the opportunities to testify before you this morning, and I'd like to have my entire statement entered into the record, but I'm going to try to summarize it and focus on some of the particular points that I think have not been raised yet and that are important to my organization, Wider Opportunities for Women.

Wider Opportunities for Women is a national nonprofit organization which works to create systemic change in employment policies, programs, and practices to ensure economic independence and an equality of opportunity for women.

Since 1964, WOW has provided skills training and outreach and career counseling, job development, and placement to thousands of women in the Washington metropolitan area. Since 1977, WOW has taken leadership in providing services to a network of more than 300 community women's employment programs, educators, employers, and others interested in expanding employment opportunities for women. Those programs serve about 250,000 women across the United States, and I raise that only to give you the sense that I'm going to be talking both about the Washington metro area and how affirmative action has helped us here in DC but also, more broadly, across the United States.

I wanted to focus this morning on three issues. The first is, has affirmative action contributed to the progress of women in the labor force? second, does discrimination contribute to inhibit women's movement into a broad range of occupations? and then, third, to discuss the issue of enforcement of affirmative action.

But I wanted to begin my statement with the more general view in support of affirmative action as a national strategy. The role of affirmative action to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future is vital to our society. It is a pragmatic problem solving approach to centuries of entrenched structural, both conscious and unconscious, discrimination on the basis of race, sex, and ethnic origin. If such discrimination is left unchecked, it will simply perpetuate itself.

I wanted to spend a couple of minutes adding to the picture that Mr. Leonard gave us of how affirmative action has added to the progress of women in the labor force. I have enclosed in my testimony a chart that shows you some of the progress of women in particular occupations, and I want to focus just for a minute on two of those occupations which are nontraditional for women and to share with you the reason we think affirmative action has made a great deal of difference in those two occupations.

Between 1960 and 1980, there was a great influx of women into the skilled trades, where, by the way, at the beginning of those two decades, we were looking at occupations which had well less than 5 percent of women generally.

By 1981, the Department of Labor reported 802,000 women employed in these fields, four times the number in 1960. While less than 20 percent of these jobs continue to be held by women, the progress made was largely due to affirmative action and the resulting increase in training programs, the increase in the number of women who were role models for other women, and the kind of support groups and other activities that women then began to offer to other women who were entering these fields.

If we look at the coal mining industry, for example, you see a particular perspective on what happened with affirmative action. Affirmative action, spurred on by citizen monitoring and some important suits, increased the number of women miners from 1 percent in 1972 to 11 percent in 1979.

During that period, we saw the growth of union support for women in the mines, recruitment and outreach efforts that were taken on by coal mining companies and also women's groups, training programs sprung up, and self-help groups for women came about because women began to believe that these jobs were appropriate for them and because it became obvious that economic benefit to women would be accrued in mining work.

Here in Washington, DC, WOW itself saw the particular effect that affirmative action had at very close hand. In the first years in which we attempted to do construction trades training of women in Washington, DC, we met with a great deal of resistance and skepticism. People told us women weren't interested in construction trades training; people told us that women simply were unable to do the physical work of construction trades employment.

With affirmative action at work and, in fact, pretty good enforcement of affirmative action in the Washington, DC, area, we began to see a slow change in that attitude. By 1982, when CETA dollars would no longer support our construction trades training program here in the District, a Metropolitan Women's Construction Trades Foundation was begun, and those who supported it were the very construction contractors and unions who had been skeptical in the beginning. That was a very direct effect of affirmative action over time.

Affirmative action allowed those employers and those unions to see that women could successfully be trained and placed in those fields and that, in fact, they made a great contribution to the industry.

I could give you some other examples of occupations in which affirmative action has made a big difference, but I'd like to instead focus on another question, which is, do we have a continuing need for affirmative action?

I've been told by officials at the Department of Labor and some of your colleagues in Congress that discrimination no longer exists to the degree that it used to and that now, while affirmative action was a useful tool, we really don't have a need for affirmative action any more.

Wider Opportunities for Women did a study last year which, I think, points out very clearly that discrimination continues to exist and exactly why we continue to need affirmative action, and, in a sense, it ties in very much with Mr. Leland's testimony previously.

We became very interested in the high-technology industries and what was happening there. We thought if we looked at newer industries, ones where there was high growth, and looked at what was happening to women in those industries, we might get a sense, in fact, of whether we did continue to see a great deal of discrimination and what was going on there.

So WOW did a yearlong study of four high-technology industries—the office and computing machinery industry, the communications equipment industry, electronic component industry, and the guided missile and space industries.

Essentially, what we found is not news and certainly does not lead one to think that in the newer growth industries discrimination does not exist. We found similar underrepresentation of women in those fields. We found that women continued to be in clerical and bottom-line manufacturing and operative roles, we found that the wage disparity continued, and I've given you some charts from our study, and I'd like to offer our study to the committee to use on an ongoing basis.

Essentially, we were very disappointed. What we found was that the high-technology industries, the new industries, the growth industries continued to have problems of discrimination against women, and I hope that as you look at the figures that we have presented to you, you, too, will see that we just can no longer pretend to accept the idea that discrimination is dead; it is quite alive; it pervades high-growth industries, it pervades new industries, and we continue to need affirmative action.

In summary, really, I'd just like to say that the consequences for women of continuing discrimination are very grim. The economic consequences, particularly of the families which are headed by women, are serious enough to warrant our action and certainly your concern in terms of continuing policies like affirmative action.

We believe, however, that we should not be here—in a sense, Mr. Hawkins, you said this earlier—trying to defend a policy that is the law of the land.

We have found that to have laws on the books and not to have them enforced is a very discouraging process for all of us. It sends a message to the worst discriminators that our country is not serious in terms of its commitment to equality of opportunity and that we will buy statements in support of equality of opportunity without results.

I feel very confident in saying that I am looking for results in terms of being shown that discrimination is behind us and that equality of opportunity and certainly better equity of economic results are with us.

Wider Opportunities for Women believes in affirmative action, can attest to its positive effects, both in Washington, DC, and across the Nation, and we believe that to be an adversary of affirmative action is to support discrimination.

I am here to say to you today that we intend to keep working with those of you in Congress who want to protect affirmative action and to say that we will not allow it to be diluted.

[The statement of Ms. Marano follows:]

AFFIRMATIVE ACTION: THE CRITICAL LINK

Testimony of Cynthia Marano, Executive Director
of Wider Opportunities for Women, Inc.

Before the Subcommittee on Employment Opportunities
of the House Education and Labor Committee

July 10, 1985

AFFIRMATIVE ACTION: THE CRITICAL LINK

Testimony of Cynthia Marano, Executive Director
Wider Opportunities for Women, Inc.
before the Subcommittee on Employment

Opportunities of the House Education and Labor
Committee

Good Morning. I am Cynthia Marano, Executive Director of Wider Opportunities for Women, Inc. (WOW). WOW is a national non-profit organization which works to create systemic change in employment policies, programs, and practices to ensure economic independence and equality of opportunity for women. Since 1964, WOW has provided outreach, career counseling, skills training, job development and job placement for thousands of women in the Washington, D.C. metropolitan area. Since 1977, WOW has provided leadership to a network of more than 300 community women's employment programs, educators, employers, and others interested in expanding women's employment options. Today WOW's network reaches into 37 states and provides services and advocacy for more than 250,000 women each year.

I am pleased to have the opportunity to explore with the Subcommittee the role affirmative action has played in expanding the labor market for women. I will focus primarily on the effect affirmative action has had on opening up nontraditional employment options for women in occupations from which we were previously segregated. Moreover, I will assert that the enforcement or nonenforcement of affirmative action has a direct effect upon whether women continue to be trained and/or placed in nontraditional jobs. But I wish to begin my statement with a more general statement in support of affirmative action as a national strategy. The role of affirmative action -- "to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future," [1] is vital in our society. It is a pragmatic, problem-solving approach to centuries of entrenched, structural, conscious and unconscious discrimination on the basis of race, sex, and ethnic origin, which if left unchecked, will simply perpetuate itself.

Affirmative action is needed because discrimination continues, pervades the labor market, and continues to have economic and social consequences for the women and minority males it affects. Affirmative action is needed because, without it, such discrimination will continue. As the Civil Rights Commission wrote in November, 1981, "when discrimination is widespread and entrenched, it becomes a self-regenerating process capable of converting what appear to be neutral acts into future discrimination." 2 WOW believes as the Commission wrote at that time:

> "... measures that take no conscious account of race, sex, or national origin often prove ineffective against processes that transform "neutrality" into discrimination. In such circumstances, the only effective remedy is affirmative action, which responds to discrimination as a self-sustaining process and dismantles it." 3

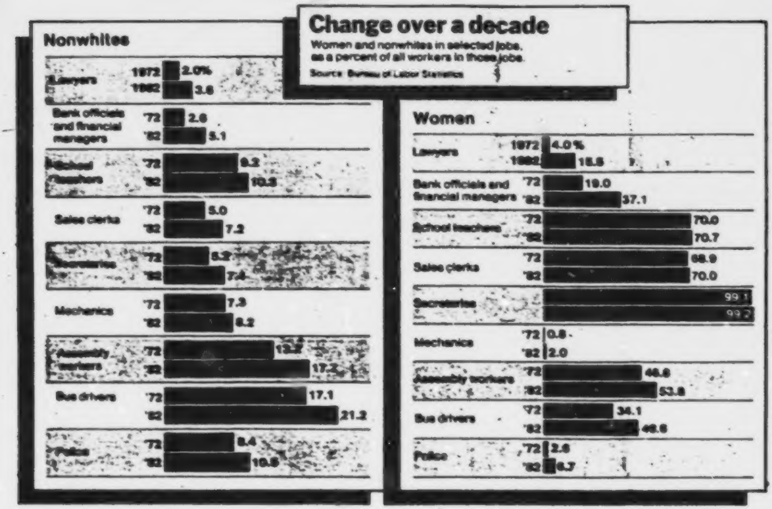
Both the progress of the last decade and the continuing impact of discrimination on women and minorities lead WOW to embrace affirmative action and to support its full enforcement.

The Progress

Wider Opportunities for Women, Inc. is proud and pleased by the progress women have made in the labor market over the past decade. A New York Times report in March graphically describes both the progress made and the challenges ahead. In Table I, attached here, a perspective of both can be gained quickly.

TABLE I:

The Progress Gained Through Affirmative Action



Change over a decade

Women and nonwhites in selected jobs, as a percent of all workers in those jobs.

Source: Bureau of Labor Statistics

THE NEW YORK TIMES, SUNDAY, MARCH 10, 1985

Women have accounted for more than 3/5 of the increase in the labor market over the past decade - - about 13.7 million women as compared to 8.4 million men. By 1990, women are expected to be 50% of the civilian labor force. [4] In 1983, 49% of the black labor force was female; 43% of the white labor force was female; and 40% of the Hispanic labor force was female. A look at the chart above, however, indicates that women are not even close to reaching 50% representation in many occupations - - especially those highly paid professional, managerial, and skilled trades occupations which have long been segregated on the basis of sex. Yet, with affirmative action, progress was made over the decade - - especially in those fields where affirmative action options were vigorously pursued.

Between 1960 and 1980, there was a great influx of women into the skilled trades. By 1981, the Department of Labor reported 802,000 women employed in these fields - - four times the number in 1960. While less than 20% of these jobs continue to be held by women, the progress made was due largely to affirmative action and the resulting increase in training programs, role models, and women successfully entering and maintaining jobs.

A look at the coal mining industry gives a good perspective on what happened. Affirmative action - - spurred on by citizen monitoring - - increased the number of women miners from 1% in

1972 to 11% in 1979.

Union support, outreach and recruitment, training programs, and self-help groups for women came about as more women believed these jobs were appropriate for them and were hired into the mines. Affirmative action policy and enforcement of the law initiated this advance and made it happen.

In the Washington metro area, WOW saw the effect of affirmative action at close hand. In its early years of work to gain access for women to the construction trades, WOW met resistance and skepticism. With affirmative action at work, slowly WOW began to train and place women in skilled construction trades jobs. In 1982, when CETA dollars would no longer support this training, construction contractors and unions themselves formed the Metropolitan Women's Construction Trades Foundation to support such training in the D.C. metro area. While that training is no longer provided through the Foundation today, the pattern of construction hiring of women in the D.C. area has been altered. While the workforce is far from equally male and female, it is no longer a fully segregated occupation.

The experience in these two occupations is reinforced by two studies of the effects of Executive Order 11246 on the employment of women and minorities. These studies, "A Review of the Effect of the Executive Order 11246 and the Federal Contract Compliance Program on the Employment Opportunities of Minorities and Women" by V. Griffin Crump (1984) and "The Impact of Affirmative Action," by Jonathan Leonard (1983) reviewed the performance data of federal contractors from 1974-1980 to assess whether federal contractors showed greater participation rates of women and minorities in particular occupational categories than noncontractors. Both concluded that the employment status of women and minorities improved at a greater rate in firms contracting with the federal government than companies not covered by Executive Order 11246. Affirmative action demonstrates positive results. It's effect on the workplace is evident.

The Continuing Impact of Discrimination

The last two decades of progress can only begin to address longer decades of discriminatory practices, however. Women continue to be segregated in clerical and low-paying service jobs in great numbers. Women are still vastly under-represented in such traditionally male fields as engineering; police work and firefighting; architecture; plumbing -- and now in the new high technology occupations.

In a year long study of four high technology industries -- The office and computing machinery, communication equipment, electronic components, and guided missile and space industries -- WOW found similar under-representation of women, except in clerical and manufacturing operative roles, where women are employed in greater numbers.

Tables C and D contained here illustrate these findings. It is disappointing that in these newer industries where jobs have been developed over the past two decades, occupatiional segregation and discrimination continue. And, while high technology will not provide the greatest growth in numbers of jobs during the next decade, jobs as technical sales representatives, electrical and electronic technicians, computer systems analysts, electrical engineers, computer programmers, and computer operators all fall within the 40 occupations with the greatest projected growth. In addition, they are expected to be jobs with good wage potential.

A review of women's status and wages in technical employment is also revealing. Table E illustrates that even where women are 50% of the workforce, their earnings are 68% of their male counterparts. Thus, discrimination is still with us even in new and high growth industries, even in firms which were founded in the past 10 years.

The Consequences

The consequences of discrimination are grim for women and minorities and for their families. Overall, women continue to earn 63 cents for every dollar earned by the average male when both are working year-round, full time. In 1983, the median wage

TABLE C.

DISTRIBUTION OF JOBS -- AVERAGES FOR FOUR INDUSTRIES*

1982

	ALL WORKERS	WOMEN WORKERS
Number of workers	1,300,322	553,036
Total (percentages)	100.0	100.0
White collar workers	60.1	45.8
Officials and managers	12.9	3.7
Professionals	21.2	8.8
Technicians	11.6	5.9
Sales workers	1.3	0.7
Office and clerical workers	13.2	26.7
Blue collar workers	38.6	53.5
Craft workers	9.3	4.8
Operatives	26.4	44.0
Laborers	2.9	4.7
Service workers	1.2	0.7

*Data covers most manufacturers of office and computing machines (SIC 357), communication equipment (SIC 366), electronic components (SIC 367), and guided missiles and space vehicles (SIC 376). Data represents most detailed breakdown available for occupational subgroups by industry and is considered representative for the industries under study.

Source: Equal Employment Opportunity Commission, EEO-1 Report Summary of Nationwide Industries (1983).

TABLE D.

PERCENTAGE OF WOMEN EMPLOYEES FOR FOUR INDUSTRIES*

1982

	Office & Computing Machinery (SIC 357)	Communication Equipment (SIC 366)	Electronic Components (SIC 367)	Guided Missiles/ Space Vehicles (SIC 376)
Total Number - Women Employed	116,685	153,719	250,799	31,823
Women as a % of All Workers	37.4	40.2	45.0	21.6
White collar	30.8	29.6	32.0	22.5
Officials and managers	12.7	10.4	13.1	4.4
Professionals	21.5	14.4	16.1	12.1
Technicians	15.3	16.6	26.1	20.6
Sales workers	18.4	14.8	24.3	13.0
Office and clerical workers	81.7	78.5	81.5	76.8
Blue collar workers	54.5	53.8	61.5	19.0
Craft workers	22.6	19.3	25.7	8.7
Operatives	63.7	63.2	71.7	32.7
Laborers	48.6	58.9	70.7	50.7
Service workers	22.6	24.8	21.6	28.9

*The columns in this table are not additive. Each number represents the percentage of women in each occupational category by industry, e.g. women account for 12.7% of all official and managerial positions in the office and computing machinery industry.

Source: Equal Employment Opportunity Commission, EEO-1 Report Summary of Nationwide Industries (1983).

TABLE E.

RATIO OF FEMALE TO MALE EARNINGS FOR SELECTED TECHNICAL OCCUPATIONS*

1982

Occupation	% Women Employed in Field	% Women's Earnings of Men's	Number of Women (000s)
Computer specialists	28	76	199
Computer programmers	32	80	123
Systems analysts	26	75	65
Engineers	5	81	CC
Aeronautical/ Astronautical	3	92	2
Electrical/ Electronic	4	74	16
Math specialists	35	62	13
Mathematicians	13	80	1
Statisticians	50	63	9
Operations and systems researchers and analysts	31	76	73
Teachers (college and university)	26	79	110
Physics	8	66	1
Mathematics	19	89	7
Engineering and science technicians	17	78	178
Drafters	17	80	46
Electrical/electronic	12	76	36
Industrial engineering	33	77	4
Other technicians (except health, engineering and science)	23	61	40
Tool programmers, numerical control	14	85	1

*Based on weekly earnings for all industries.

Source: U.S. Department of Labor, Bureau of Labor Statistics, Unpublished Tabulations from Current Population Survey, 1982 Annual Averages (1983).

of year-round full-time workers was lowest for black women.

The poverty rates of women and women who head families is a stark consequence of employment discrimination. In 1983, women represented 61% of all persons aged 16 and over who had incomes below the poverty level. Nearly 72% of black families with incomes below the poverty level (including 3.2 million related children) were headed by women. Forty-six percent of Hispanic families (and nearly 1 million related children) were headed by women. For such women -- especially women of color -- it is not enough to talk about a color and sex-bias free society. Affirmative action is critically needed.

Enforcement

But, of course, affirmative action is the law of the land. I should not need to be defending its impact, the progress it has brought about, or our continued need for it. What we have learned over the past four years is that laws and regulations establishing the nation's commitment to equality of opportunity are not enough. To have such laws and regulations and to fail to enforce them sends a message that discrimination -- the status quo -- is acceptable.

Affirmative action, goals and timetables, and enforcement of regulations are not "adversarial" unless the adversary is discrimination. The issuance of proposed regulations by the

OFCCP in 1981 and 1982 which would have released 75% of federal contractors from the requirements of preparing written affirmative action plans might have seemed like a lessening of corporate paperwork. In fact, it also lessened the capacity of the OFCCP to monitor the performance of these contractors. These proposed regulations sent a clear message to the contractor community. Similarly, the National Self Monitoring Reporting System, instituted by the OFCCP, strengthens that message. It allows large multi-facility contractors to monitor their own affirmative action performance with little or no oversight by the OFCCP.

The last two decades of affirmative action policy -- the strengthening of accountability for fairly integrating the work force -- is being undermined by such policies. The nature of affirmative action policy and the affirmative action programs which have resulted are to identify methods of discrimination and to systematically address them. This requires a monitoring and enforcement role without which WOW believes the system cannot operate.

When it works well -- and we believe it had just begun to do so from 1974 to 1980 -- affirmative action creates an atmosphere America and American business is familiar with. It identifies a problem, defines ways to solve the problem, and monitors to see that the problem is addressed. It's a familiar American message of "can do". The "can do" in this instance is the elimination of employment discrimination against women and minorities.

WOW believes in affirmative action, can attest to its positive effect on the workplace, on women in Washington, DC, and on communities across the nation. Affirmative action works so that protected classes can work and flourish in economic independence. I am here today to say to you in Congress and to the Administration that affirmative action works; it's necessary; and we cannot allow it to be diluted.

Footnotes

[1] U.S. Commission on Civil Rights, "Statement on Affirmative Action," p. 2 (1977).

[2] U.S. Civil Rights Commission, "Affirmative Action in the 1980's: Dismantling the Process of Discrimination," p.2, (1981).

[3] Ibid. p. 2.

[4] Women's Bureau, U. S. Department of Labor, "20 Facts on Women Workers," 1984.

Mr. **Martinez** Thank you very much, Ms. Marano.

We are now going to recess for 10 minutes—there is a vote on the floor—and we will be back. Would you please stay?

Ms. **Marano**. Sure.

Mr. **Martinez**. We will probably have questions from the panel for you.

[Recess.]

Mr. **Edwards** [acting chairman]. The subcommittee will come to order.

I believe that Ms. Marano completed her testimony, and we will have some questions. I will turn over the chair to Mr. Martinez.

Mr. **Martinez** [presiding]. Thank you, Mr. Edwards.

I have one question. Affirmative action is working, and, from your perspective, it is working for women who had been denied certain kinds of jobs.

Ms. **Marano**. That's correct.

Mr. **Martinez**. Chairman Hawkins and I were having a discussion on our way to vote about those people that seem to feel that affirmative action is a tool for someone to get more than they are entitled to. Although they are more subtle in their arguments than what I have just stated, it really comes down to that.

In my mind, affirmative action has been put in place for those who feel that some people should be denied opportunities because of their national origin, gender, race, or sex.

From your experience, as you have stated, you seem quite confident that it is working and that any distraction from the initial intent of this is to do great harm to those groups that we are all concerned about.

There are those areas where women traditionally have not held jobs. We have put women in a certain role, telling them that there are certain kinds of jobs they should have. Women have crushed that myth. They belong any place they have the ability to be.

Could you elaborate on some of the experiences you have had with how effectively this is working?

Ms. **Marano**. Yes. I'm delighted to have the opportunity to do that.

I think Wider Opportunities for Women is in a good place to discuss this, because one of the goals of our organization is to look at the movement of women into occupations where they have traditionally been in very small numbers.

Something that I'd like to report on is that, several years ago, we did a study of women in the construction trades and the effect of affirmative action on women in the construction trades, and we went to four locales in the country, and we did interviews. We did interviews with women who were interested in entering construction trades employment, we did interviews with enforcement officials, we did interviews with the employers themselves and with unions.

Interestingly enough, the results from those interviews were not particularly different. Employers told us that the goals and timetables for women in the construction trades were the reason that they were hiring women into those jobs.

What they said to us was,

> Now, I myself would hire women, but the other construction companies here in this city would only hire women if they were forced to by the Federal Government. Now, we've hired a few women, and they're doing very well.

We believe that affirmative action has acted as a spurt in that particular way. It has made movement where women have been able to enter fields they hadn't, and that action of moving women in creates a whole different scope of opportunity.

We have been focusing more recently on the technical occupations, and we think we have begun to see the same sort of thing, only, I'll tell you, it's harder, and it's harder in part because the high-technology industries are not experiencing the same feeling of needing to go along with the affirmative action guidelines that the construction industry was feeling before.

It's much tougher at the moment, and it's much tougher on individual women, because of that lack of a Federal pressure on those employers to broaden their work forces.

Mr. **Martinez**. Do you find that those people who have gone ahead and hired women because of affirmative action all of a sudden find, "Boy, they really can do a job; where have I been all this time? I've been overlooking a mighty potential work force"?

Ms. **Marano**. Well, in fact, that's the very reason that I described to you the experience with the Metropolitan Construction Trades Foundation. The very employers that told us 5 years previously that women could not operate in those occupations themselves banded together to pay for continued construction trades training of women, and that attitude changed because it had to, and then they saw women perform.

That's why I am so concerned when I hear some individuals say, "What we have to be concerned about is creating a feeling of equality of opportunity." If the results don't happen and we don't actually see a broader number of women and minorities enter these kinds of fields, it's really an empty discussion.

Mr. **Martinez**. You indicate that there still is rampant discrimination out there. Would you elaborate on that a little?

Ms. **Marano**. Yes. I had intended to bring with me today Darlene Payne, who is one of our trainees who is now working as a nontraditional worker for a television industry employer. She was one of the very first women that that particular employer brought on to the work force, and she experienced a number of problems. Many of those problems were unconscious on the part of the employer, but they have been remedied through that employer's experience with people like Darlene.

I think that her experience is not unusual. We serve about 300 women every year, and we hear repeated cases of quite blatant discrimination, and it does exist, and it's got to be dealt with.

Mr. **Martinez**. One last question, and, just before I ask that question, I'd like to introduce Steve Gunderson, who has just joined us, a member of the Subcommittee on Employment Opportunities.

If the administration were successful in arguing its interpretation of affirmative action policies and the limitations of remedies, how would it impact on women?

Ms. **Marano**. There are three particular ways I think that women would be most affected. The first is that one would begin to see an eroding of the progress of women moving into occupations where they previously had been segregated.

The second, I think, is that, while we cannot talk about affirmative action being responsible for the entire changes in terms of economic status, I think women's economic status as a group is very vulnerable right now, and to pull back on affirmative action would have a negative economic impact on women's wages.

I think the third is that the climate that was created by affirmative action resulted in a number of things. One is that training programs in occupations that are nontraditional for women sprung up to train women so that there would be people available for nontraditional jobs in the past.

The Job Training Partnership Act and the new Vocational Education Act and other pieces of legislation like that are based and have included language to try to keep that momentum going.

The pulling back on affirmative action is going to mean that people who are being trained are going to have a hard time getting jobs. So we will have a group of women who have just begun to get interested in these fields, will have trained for these fields, and won't be able to be placed, and that is a very negative impact as well.

Mr. MARTINEZ. Thank you.

Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman.

Ms. Marano, I think your testimony is really very helpful and useful to both committees.

Your job is going to be even tougher unless H.R. 700 passes, because, in all of these areas and institutions where Federal funds are involved—and there are an awful lot of them—construction of Federal buildings, and federal aid to schools, colleges, hospitals, public transportation—your remedies are just not going to be there.

Ms. MARANO. That's certainly the case.

Mr. EDWARDS. I know you are a nonprofit organization and probably can't lobby, but it's really almost a desperate situation with regard to the *Grove City* decision.

I have one question. What is the difference between affirmative action and quotas?

Ms. MARANO. I think it's a very good question and certainly one that is still confused in the eyes of most of the public. Quotas and affirmative action goals and timetables that we do have in place as part of our laws now are quite different.

Goals and timetables are a very familiar business practice in the United States. One sets a goal—one identifies a problem, one sets a goal, and one describes a series of strategies to try to achieve the goal. Sometimes you make your goal, and sometimes you don't.

A quota system is quite a different and more rigid system. Our affirmative action policies across the United States are based on goals and timetables, not quotas.

The number of firms that have been disbarred, even under the executive order by the OFCCP, is very small over the number of years.

The number of times in which serious, deleterious effects have been felt by employers who discriminate is very small. What we are talking about here is setting goals, trying to meet those goals by taking positive steps, and then measuring what happens if you do or don't meet them.

Mr. EDWARDS. That's very helpful. Thank you, and thank you for your testimony.

Mr. MARTINEZ. Thank you, Mr. Edwards.

Mr. Gunderson.

Mr. GUNDERSON. No questions, Mr. Chairman.

Mr. MARTINEZ. Mr. Hawkins.

Mr. HAWKINS. Let me go back to the question Mr. Edwards asked. I think you made a very fine and correct distinction between goals and quotas. However, is it not true that in many instances the courts—the Supreme Court itself—have not hesitated to set quotas as a remedy and to uphold quotas?

Ms. MARANO. As I understand it in terms of the affirmative action programs that we in particular have been following—and I wish that I were more informed on the full judiciary background on affirmative action—with regard to the OFCCP and the programs that we have been following, we are talking about goals and timetables. I really can't speak very intelligently to you on quotas.

Mr. HAWKINS. Let me then change the question. Is it not true that affirmative action is the law of the land, as you have stated, and that much of the discussion this morning has been whether or not the law of the land should be enforced and upheld?

Ms. MARANO. That is correct.

It is very disturbing to us that we have to come here before you and talk about whether or not we should continue the law of the land, when it has been a historical great step of progress. The law is affirmative action. Affirmative action is working, and we think that to dilute it in any way is a totally unacceptable act.

Mr. HAWKINS. If it is the law of the land, and the Justice Department presumably is defending the law of the land, what is the explanation then for Mr. Reynolds and others, representing this administration, not upholding the law? Can you offer any explanation other than perhaps a political explanation?

Ms. MARANO. The only explanation that I can come up with is one of ideology and a decision not to uphold what you so correctly pointed out earlier was the result of bipartisan and quite broad national support. It seems to us to be a very clear attempt to take an ideology of a small number of people and use it to define the law of the land, and we think that that's unacceptable.

Mr. HAWKINS. In my experience, I recall that the courts have never required that less qualified people be hired under the concept of affirmative action. Has that been your experience, that affirmative action assumes that individuals would be hired who are qualified for the job. Discrimination based on a group classification is a thing which is prohibited, isn't that correct?

Ms. MARANO. That's correct, and particularly from our experience, looking at occupations like the construction trades, where a number of the programs with which we work around the country would have trained women in occupational skills where the skills were defined by the employers, women would have graduated from the skills training programs and then still be unable to find work.

That kind of experience tells you that it is not an issue of qualification, it is an issue of discrimination.

Mr. Hawkins. Is it not also true that in many instances minorities are expected to have much higher qualifications than nonminorities to be even given the opportunity.

Ms. Marano. I know that it is the experience of our employment programs around the country that both with regard to women and minorities the experience has been that one had to prove oneself far more as a minority or a women to get the same job.

Mr. Hawkins. Is the same true with promotions?

Ms. Marano. Yes; I think that's an across-the-board problem.

Mr. Hawkins. Thank you.

Mr. Martinez. Thank you, Mr. Hawkins, and thank you, Ms. Marano, for joining us and giving us the benefit of your expertise.

Ms. Marano. Thank you.

Mr. Martinez. With that, we will invite the next panel to come up. William McEwen, chairman of the Equal Employment Opportunity Committee, National Association of Manufacturers; and Ronald Lightstone, vice president, VIACOM, Inc.

Gentlemen, welcome.

Would you like to proceed, Mr. McEwen?

Let me remind you, your written statement will be entered into the record in its entirety. So, you have the option of summarizing.

TESTIMONY OF WILLIAM McEWEN, CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMITTEE, NATIONAL ASSOCIATION OF MANUFACTURERS, ACCOMPANIED BY JIM CONWAY, ASSOCIATE DIRECTOR, HUMAN RESOURCES AND EQUAL OPPORTUNITY COMMITTEE; AND RONALD LIGHTSTONE, VICE PRESIDENT, VIACOM, INC.

Mr. McEwen. Thank you, Mr. Chairman.

I was going to make the comment that I will be giving a summary of our testimony and hoping that the remainder will be put into the record.

Mr. Chairman and members of the subcommittees, I'm William McEwen, director of equal opportunity affairs, Monsanto Co., and I'm testifying today on behalf of the National Association of Manufacturers as chairman of the Human Resources Steering Group for NAM.

Accompanying me today is Jim Conway, associate director of NAM's Human Resources and Equal Opportunity Committee.

The association is an organization of 13,500 corporations, large and small, located in every State. NAM members employ 85 percent of all workers in manufacturing and produce more than 80 percent of the Nation's manufactured goods. NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council.

On behalf of all of our members, I'd like to thank you for this opportunity to express our opinion on affirmative action and the direction industry believes that it should take in the decade ahead.

The National Association of Manufacturers believe affirmative action has been and is an effective way of ensuring equal opportunity for all people in the workplace. Minorities and women, once systematically excluded from many professions and companies, are now systematically included.

Doors of opportunity have been opened to many qualified persons who, absent affirmative action, might never have achieved the level of success that they enjoy today.

The benefits of affirmative action have accrued not only to individuals of all creeds, colors, and sexes, but also to business and society. Diversity in work force participation has produced new ideas, opinions, and perspectives in management, product development, and marketing.

Efforts in the area of recruitment, hiring, and promotion by corporations have led to improved job satisfaction, labor-management communication, productivity and community relations.

Certainly, business's efforts to include all sectors of the American population in the work force cannot account for all the significant progress that has been achieved since the passage of Title VII of the Civil Rights Act of 1964.

Economic growth, enhanced educational achievement by minorities and women, and job training have played a pivotal role in the work force diversity we see today.

Industry is committed to affirmative action as it applies to outreach, to recruitment, counseling, and training activities designed to ensure that qualified minorities and women are considered for employment opportunities.

NAM opposes quotas in whatever form manifested. Quotas do not benefit industry, society, or minorities and women.

As the debate on affirmative action has emerged in recent years, much attention has been focused on goals and timetables versus quotas. Industry does not believe that numerical goals for minority or female inclusion in the work force, by themselves, constitute quotas.

Business, particularly big business, sets goals and timetables for every aspect of our operations—profits, capital investment, productivity increases, or promotional potential for individuals.

Setting goals and timetables for minority and female participation is a way of measuring progress and focusing on potential discrimination, and it's the way we always do business.

Twenty years of exposure to affirmative action enforcement statutes have provided employers with an insight into some of our problems. After two decades, it's time to refine affirmative action procedures in order to make them less onerous and more effective.

A major problem that exists in the enforcement area is the lack of a cohesive and comprehensive Federal civil rights policy. Employers are getting mixed signals from the various Federal agencies with civil rights enforcement jurisdiction, and here I mean from the Equal Employment Opportunity Commission, from the Office of Federal Contract Compliance Programs, from the Justice Department, and from the Civil Rights Commission.

Conflicting standards and unnecessary paperwork have resulted in a lack of coordinated authority. It is necessary for these Federal agencies to resolve their different interpretations of affirmative action programs, and we recommend the establishment of a task force or a White House point to review these differing standards.

The evolution of OFCCP into a major government enforcement agency has occurred with a minimum of review either by Congress or by program administrators.

Over the years, OFCCP has evolved increasingly stringent regulations that tended to transform affirmative action obligation into a system that could be construed as quota requirements. These regulations have engendered the criticism that the agencies now face.

To be just point blank, we are talking about what has happened with implementing regulations as opposed to the executive order itself.

Although the OFCCP has shown marked improvement in recent years, additional changes are needed to make that agency more objective. There exist substantial questions as to OFCCP's authority to award backpay, for instance, as a remedial measure. OFCCP regs did not even refer to backpay until 1977, almost 12 years after the Executive Order 11246 became effective. Backpay authority, in our opinion, is one area that must be analyzed for its legality.

We do, however, support the OFCCP's attempts to allow flexibility for contractors in their efforts to comply with agency regulations. Good faith compliance should be a measure of compliance, not of strict numerical goals, and what we are saying is, we need to go back to that concept of good faith effort.

Furthermore, it's time for the director for the OFCCP to be named. The agency has been without a director for about 3 years. This has resulted in delays in getting regulations passed. It has left the employer community in limbo, without any clear leadership, and leadership must ensure, and clear regulations allow, more flexibility in use of numbers.

Affirmative action has produced positive results for minorities and women. A study recently published by the Potomac Institute entitled "A Decade Of New Opportunity: Affirmative Action In The 1970's" shows significant progress made during the 1970's as a result of private industry's adoption of affirmative action programs.

The analysis used statistics derived from the Equal Employment Opportunity Commission's employee information reports, and most of us are familiar with EEO-1 forms, and these are filed annually by employers with 100 or more employees.

The Potomac Institute's study found that substantial gains have been made in the inclusion of minorities and women in the workplace in both blue-collar and management and professional job categories.

For examples, blacks' overall share of the private job market increased 15 percent, from 10.1 percent in 1970 to 11.6 percent in 1980. Black officials and managers rose from 1.9 percent to 4 percent, a 104-percent increase. Professionals are from 2.5 percent to 4.3 percent, which is a 72-percent increase, and black skilled workers from 5.6 percent to 8.4 percent, which is a 50-percent increase.

Women and Hispanics show similar gains, rising to 41 percent from 34 percent in 1970, an increase of 19 percent. Women in the professional categories increased to 37.7 percent from 24.6 percent, and so on.

It should be noted that these gains in the employment of minorities and women during the 1970's came in spite of simultaneous contraction in the economic growth, high inflation, and other problems that occurred during that decade.

The experience of my company, Monsanto, reflects the gains that can be achieved by minorities and women through a corporate affirmative action program. In the period from 1973 to 1984, our exempt professional positions occupied by women grew from 5.2 percent to 15.6 percent. Minority representation went from 4.5 percent to 10.6 percent.

In looking at the problem of what happens after people get on the work force, in that same period, middle and upper management representation of minorities and women increased 442 percent, from 1.2 percent of our upper management to 6.5 percent.

In a related area, if you are talking about affirmative action in purchases for minority-owned firms, ours jumped from $15,000 in 1973 to $43 million in 1984.

Some of the progress reflected in these statistics would have occurred even in the absence of affirmative action, and we are not arguing that. What we are saying is that the rate of progress would have been infinitely slower.

Affirmative action programs in industry have increased minority and female participation in the work force, and this has led to a better working environment, to improved communications, and has benefited corporate relations within our communities. More must be done, however. The job to incorporate all sectors of our society into the work force is not complete.

We agree with Secretary of Labor William E. Brock, who stated on June 24 of this year in support of the continuation of some type of affirmative action, "But we, as a country, have lived for 200 years with a major part of our population in remarkable disadvantage, and it takes some time to recover from that."

In our endorsement of voluntary affirmative action programs, it should be made clear that we do not endorse quotas in whatever form manifested. NAM believes that there is a difference between goals and quotas, flexibility versus rigidity.

As to that point, we believe that OFCCP can be improved significantly by reducing unnecessary regulatory burdens and providing employers with more flexibility and more clarity.

Rigid numerical goals should give way to good faith efforts by business to include women and minorities in the work force, and this will dispel the claims of reverse discrimination.

Affirmative action, in our opinion, is, at its best, good business. As a result, we at NAM remain committed to the ends of equal employment opportunity for all through affirmative action.

Thank you.

[The statement of Mr. McEwen follows:]

National Association of Manufacturers

TESTIMONY OF

WILLIAM S. McEWEN
DIRECTOR, EQUAL OPPORTUNITY AFFAIRS
MONSANTO COMPANY

ON BEHALF OF

THE NATIONAL ASSOCIATION OF MANUFACTURERS

ON

AFFIRMATIVE ACTION

BEFORE

THE SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES
OF THE COMMITTEE ON EDUCATION AND LABOR
AND
THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY

JULY 10, 1985

1776 F Street, N.W. • Washington, D.C. 20006 • (202) 626-3700

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JULY 10, 1985

Mr. Chairman and members of the Subcommittee, I am William McEwen, Director of Equal Opportunity Affairs with Monsanto Company. I am testifying today on behalf of the National Association of Manufacturers as Chairman of the Human Resources Steering Group for NAM. Accompanying me today is Jim Conway, Associate Director of NAM's Human Resources and Equal Opportunity Committee. NAM is an organization of 13,500 corporations, large and small, located in every state. NAM members employ 85 percent of all workers in manufacturing and produce more than 80 percent of the nation's manufactured goods. NAM is affliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council. On behalf of all our members, I would like to thank you for this opportunity to express our opinion on affirmative action and the direction industry believes it should take in the decade ahead.

I. Introduction

The National Association of Manufacturers believes affirmative action has been, and is, an effective way of ensuring equal opportunity for all people in the workplace. Minorities and women, once systematically excluded from many professions and companies, are now systematically included. Doors of opportunity have been opened to many qualified persons, who, absent affirmative action, might never have achieved the level of success they enjoy today.

The benefits of affirmative action have accrued not only to individuals of all creeds, colors and sexes, but also to business and society. Diversity in workforce participation has produced new ideas, opinions and perspectives in management, product development and marketing. Efforts in the areas of recruitment, hiring and promotion by corporations have led to improvement in job satisfaction, labor management communication, productivity and community relations.

Certainly business' efforts to include all sectors of the American population in the workforce cannot account for all the significant progress which has been achieved since the passage of Title VII of the Civil Rights Act of 1964. Economic growth, enhanced educational achievements by minorities and women and job training have played a pivotal role in the workforce diversity we see today.

The strides made by women and minorities have been significant during the past two decades, but the battle to ensure "colorblind" and "sexblind" employment opportunity is far from over. The bulk of the progress has been made in incorporating minorities and women into entry level and middle management positions. Much more must be done to ensure that opportunity exists at all levels.

For the past two decades, industry, Congress and the various agencies charged with enforcement of civil rights law have grappled with how equal employment opportunity can be achieved. Errors have been made. Successes have been achieved. As we look to the decade ahead we should build on our experience.

Industry is committed to affirmative action as it applies to outreach, recruitment, counseling and training activies designed to assure that qualified minorities and women are considered for employment opportunities. NAM opposes quotas in whatever form manifested. Quotas do not benefit business, society or minorities and women. Tokenism can only create poor employee morale, reverse discrimination and an environment where even qualified minorities and women are viewed with skepticism, rather than respect based on their abilities.

As the debate on affirmative action has emerged in recent years, much attention has focused on goals and timetables versus quotas. Industry does not believe that numerical goals for minority inclusion in the workforce, by themselves, constitute quotas. Business, particularly big business, sets goals and timetables for every aspect of its operations -- profits, capital investment, productivity increases and promotional potential for individuals. Setting goals and timetables for minority and female participation is a way of measuring progress and focusing on potential discrimination.

Industry recognizes, however, that goals and timetables can become masks for rigid quotas. We oppose any regulations that turn positive programs for measuring progress into unweilding rules on the number of minorities and women who must encompass the workplace. Yet, voluntary goals set by corporations for workforce participation should not be viewed as eroding equal opportunity objectives. These goals are merely a recognition that ingrained prejudices remain in our society. Assuring equal opportunity, at least for the next few years to come, means we must be ever vigilant in facing these prejudices and overcoming them. With this is background, we will discuss some of the reasons for continuation of affirmative action programs and the direction we think enforcement of civil rights laws should take in the future.

II. History of Affirmative Action

The ban on discrimination in employment as a government contract requirement had its beginning in the early 1940's. The term "affirmative action" was first used in Executive Order 10925 in 1961, which established a results-oriented program that required a federal contractor to do more than simply not discriminate. In 1963, with the issuance of Executive Order 11114, the government contract program was broadened to cover all employees of a government contractor, thus extending the obligation beyond those performing contract work.

In 1965, Executive Order 11246 was issued which accomplished an extensive reorganization of the civil rights functions in government. Of major import, the Order created a new office in the Department of Labor, the Office of Federal Contract Compliance Programs (OFCCP), to handle compliance under the government nondiscrimination program. Its development culminated with the consolidation of the compliance functions into the Office of Federal Contract Compliance Programs (OFCCP) in 1978.

Affirmative action is also carried out under Title VII of the Civil Rights Act of 1964. Under Title VII, affirmative action may be ordered as a remedy to private actions brought by individuals and in actions initiated by the Equal Employment Opportunity Commission, both pursuant to a statutory scheme where a violation as defined in Title VII has occurred. Thus, under Title VII the nexus to affirmative action is a violation of the statute. Under Executive Order 11246, the nexus is the government contract.

III. Enforcement of Affirmative Action

Twenty years of exposure to affirmative action enforcement statutes have provided employers with an insight into some of their problems. After two decades, it is time to refine affirmative action procedures in order to make them less onerous and more effective.

A major problem that exists in the enforcement area is the lack of a cohesive and comprehensive federal civil rights policy. Employers are getting mixed signals from the various federal aencies with civil rights enforcement jurisdication--the Equal Employment Opportunity Commission (EEOC), Office of Federal Contract Compliance Programs (OFCCP), the Justice Department and the Civil Rights Commission. Conflicting standards and unnecessary paperwork has resulted from the lack of coordinating authority.

It is necessary for these federal agencies to resolve their different interpretations of affirmative action programs. We recommend the establishment of a task force or "White House" point to review the differing standards.

The evolution of the OFCCP into a major government enforcement agency has occured with a minimum of review either by Congress or by the program administrators. Over the years, the OFCCP evolved increasingly stringent regulations that tended to transform the affirmative action obligation into a system that could be construed as quota requirements. These regulations have engendered the criticism that the agency now faces.

Though the OFCCP has shown marked improvement in recent years, additional changes are needed to make that agency more objective.

There exists substantial questions as to the OFCCP authority to award back pay as a remedial measure. OFCCP's regulations did not even refer to back pay until 1977, almost 12 years after Executive Order 11246 became effective. Back pay authority must be analyzed for its legality.

Regulatory reform at the OFCCP has been stagnant for quite some time for various reasons. Various proposals have been discussed but have not been promulgated and this inaction has served to further confuse employers attempting to construct their affirmative action programs.

Specifically, great problems have arisen in the area of availability and underutilization analysis policy. Revised Order Number 4, promulgated in 1971, defined utilization and in 1974 the OFCCP issued a memorandum expanding that definition. Basically, underutilization is to be found where there exists any difference between the availability of minorities or women for a job group and the number of such persons actually employed in the job group.

In 1981, the OFCCP proposed to amend its rules to provide that contractors would be presumed to have reasonably utilized minorities and women in any job group in which their employment was at least 80 percent of availability. The 80 percent proposal was never adopted as official policy but the agency has, as a matter of practice, permitted contractors to use the 80 percent standard or other statistically defensible method of determining underutilization. In addition to the 80 percent rule, the OFCCP has unofficially allowed contractors to use other standards in evidence good faith efforts to comply.

We support the OFCCP's attempts to allow flexibility for contractors in their efforts to comply with agency regulations. Good faith compliance should be the measure of compliance, not strict numerical goals. Furthermore, it is time that a director for the OFCCP is named. The agency has been without a director for about three years. This has resulted in delays in getting regulations passed. It has left the employer community in limbo without any clear leadership. Leadership must ensue and clear regulations allowing more flexibility in the use of "numbers" must be promulgated.

IV. Results of Affirmative Action Programs

Affirmative action has produced positive results for minorities and women. A study recently published by the Potamac Institute entitled A Decade of New Opportunity: Affirmative Action in the 1970s, shows the significant progress made during the 1970s as a result of private industry's adoption of affirmative action programs. The analysis used statistics derived from the Equal Employment Opportunity Commission's Employer Information Reports (EEO-1) that are filed annually by employers with 100 or more employees.

The Potomac Institute's study found that substantial gains have been made in the inclusion of minorities and women in the workplace in blue collar, management and professional job categories. For example, black's overall share of the private job market increased 15 percent from 10.1 percent in 1970 to 11.6 percent in 1980. Black officials and managers rose from 1.9 percent to 4.0 percent, a 104 percent increase, professionals 2.5 percent to 4.3 percent, a 72 percent increase, and black skilled workers from 5.6 percent to 8.4 percent, a 50 percent increase.

Women's share of the private job market has been even more dramatic, rising to 41 percent from 34 percent in 1970, an increase of 19 percent. Women in the professionals category increased to 37.7 percent from 24.6 percent, a 53 percent gain, and in the technicians category increased to 40.2 percent from 26.4 percent in 1970, a 52 percent gain. Hispanics also showed similar gains in all areas.

It should be noted that these gains in the employment of minorities and women during the 1970s came in spite of the simultaneous contraction in economic growth and high inflation that occurred in that decade.

The General Motors Corporation, one of our nation's largest employers, showed an increase in white collar employment of minorities in every job category during the period from 1982 to 1984. For instance, minorities in the professional category jumped from 9.4 percent of the GM workforce in 1982 to 10.5 percent in 1984. GM's commitment to affirmative action extends to the community where various programs and grants provide education and training, minority supplier development, loans to minority firms and minority banking and insurance programs. The Westinghouse Corporation showed significant increases among minorities and females in both managerial and professional job categories in the period from 1967 to 1983. Measures taken in the Westinghouse affirmative action program include aggressive recruitment, a steering committee for minority communications, community service and minority spokespersons programs.

The experience of my company, Monsanto, reflects the gains that can be achieved by minorities and women through a corporate affirmative action program.

In the period from 1973 to 1984, exempt professional positions occupied by women grew from 5.2 percent to 15.6 percent; minorities went from 4.5 percent to 10.6 percent. In that same period, middle and upper management representation increased 442 percent from 1.2 percent to 6.5 percent. Non-raw material purchases from minority-owned firms jumped from $15,000 to $43 million. Some of the progress reflected in these statistics would have occurred in the absence of affirmative actions. However, it goes without saying that the rate of progress would have been infinitely slower.

Affirmative action programs in industry have increased minority and female participation in the workforce and this has led to a better working environment, improved communications and benefitted corporate relations with the community. More must be done, however. The job to incorporate all sectors of our society into the workforce is not complete.

V. Affirmative Action and Title VII

Many questions have been raised concerning the continued vitality of affirmative action since June 24, 1984, when the Supreme Court decided Firefighters Local Union No. 1784 v. Stotts (104 S.Ct. 2576). The Stotts case involved a challenge to a court order issued in May 1981 which effectively prohibited the Memphis Fire Department from laying off minority employees in accordance with a seniority system.

The Supreme Court held in Stotts that the lower court exceeded its authority in overriding a bonafide seniority system to preserve employment gains under a previously approved consent decree.

There have been many different interpretations of the Supreme Court's decision. Read most narrowly, the decision holds only that a federal court may not override a bonafide seniority system to prevent the layoff of minority employees unless they have been identified individually as victims of discrimination. This is clearly spelled out in Title VII and does not, NAM believes, invalidate affirmative action programs. The Supreme Court supports this belief.

In the 1979 United Steelworkers v. Weber (443 U.S.193), the Supreme Court upheld a voluntary private affirmative action plan that did not call for the displacement of any employees. We support Stotts, which prohibits quotas in layoffs and can be seen as reverse discrimination. However, affirmative action plans open doors of opportunity by calling for the establishment of goals, timetables and outreach in the recruitment, hiring and promotion of minorities. These is neither quotas or reverse discrimination. The object of such programs is not to displace existing employees in order to provide those opportunities.

VI. Conclusion

The establishment of corporate affirmative action programs have been the result of industry's commitment to the inclusion of minorities and women in the workplace. These programs have indeed succeeded in increasing opportunities for minorities and women. The question which must be asked is if these gains have alleviated the need for affirmative action programs in private industry. The NAM is of the opinion that that time has not yet come, but will be unnecessary when true diversity in the workplace is reached.

We agree with Secretary of Labor William E. Brock, who stated on June 24 of this year, in support of the continuation of some type of affirmative action:

> "But we as a country have lived for 200 years with a major part of our population in remarkable disadvantage. . . And it takes some time to recover from that."

Many have argued against affirmative action because they say it does not embrace the ideal of a color-blind society. We believe a society that is truly color-blind (and gender-blind) can only be achieved when there is equal opportunity and inclusion in the workplace for every citizen of every nationality, race and sex. When that ideal is achieved there will be no need for continuing affirmative action in the private sector.

In our endorsement of voluntary affirmative action programs, it should be made clear that we do not endorse quotas in whatever form manifested. NAM believes there is a difference between flexible goals and quotas. As to that point, we believe the OFCCP can be improved significantly by reducing unnecessary regulatory burdens and providing employers with more flexibility and clarity. Rigid numerical goals should give way to good faith efforts by business to include women and minorities in the workforce. This will dispell claims of reverse discrimination.

Affirmative action, at its best, is good business. As a result, NAM remains committed to the ends of equal employment opportunity for all through affirmative action.

Mr. **Edwards** [acting chairman]. Thank you very much, Mr. McEwen and Mr. Conway.

Before we have any questions, we will hear from Mr. Ronald Lightstone, who is vice president of VIACOM, Inc.

Welcome, Mr. Lightstone.

Without objection, your full statement will be made a part of the record, and you may proceed.

Mr. **Lightstone**. Thank you, Mr. Chairman and members of the subcommittees. I appreciate the opportunity to appear before you today to share the perspective of my company, VIACOM International, Inc.

I am senior vice president of corporate and legal affairs for VIACOM, which is a diversified communications and entertainment company. We are the 10th largest cable television operator in the country, serving approximately 800,000 subscribers. We also provide satellite entertainment services through our subsidiary which we jointly own, Showtime, and the movie channel. We own four television and eight radio stations, and we operate jointly with ABC and the Hearst Corporation in Lifetime, which is one of the largest advertiser-supported cable television services. In addition, we produce and distribute television programs, motion pictures, and television commercials throughout the world.

My message is simple. Affirmative action, we believe, has become a routine part of American life and is certainly a part of VIACOM's annual business goals. We intend to keep it that way. We are involved in affirmative action today because it is the right thing to do, not because we have to.

Affirmative action has been a part of American business for nearly 25 years, and a recent study by the Potomac Institute has concluded that the significant progress toward equal opportunity by minorities is due, in large part, to the Federal Government's affirmative action program and private industry's adoption of it.

In the business community, we have spent an extraordinary amount of time and energy over the years working out rules and procedures with the Government. This includes the formulation of real numerical measures for progress, something that all of us can understand.

Affirmative action has also been assisted by market forces. Between 1979 and 1984, the earnings of women, as an example, compared to men rose at probably the most rapid rate in our history.

During the past decade, far more women have entered medicine, law, accounting, and other well-paid and highly skilled occupations, and affirmative action had a major role in that.

Affirmative action has also made great strides because of a partnership between the Government and business. Because of the overall impact and importance on society, affirmative action is a concept that must be shared by both Government and business. I see the political system as the originator and the breeding ground for debate and for new ideas on affirmative action and business as the delivery system and the testing ground for those ideas.

This alliance of Government and business is exemplified by the cable television industry's role in passage of the Cable Communications Policy Act of 1984. An important part of that law is section 634 regarding equal employment opportunity, and while I'm sure you are all familiar with this legislation, I believe it's important to note that this is a provision in the act that was supported by the cable television industry, and we believe it will continue for that act and those provisions in the future.

Although the act does not specify prescribed numerical employment parity, cable operators are required, pursuant to the act, to make their best efforts to afford equal opportunity employment.

Additionally, the FCC will annually certify all entities found to be in compliance with the specific procedures, and at least once every 5 years the FCC must conduct a more detailed investigation of the employment practices.

Mr. Chairman, Government and business must continue to move forward to progress on affirmative action and related programs. While we have made progress in equal employment, we have a long way to go.

For example, today we are troubled by the 43-percent unemployment rate among black youth. Labor Secretary Brock has called that a national tragedy. This is one area where business and Government must work together and make improvements.

I come here today to stress the need for continued cooperation between the Government and business. I believe that most of the business community—it is certainly the case with television industry—is convinced of the need for affirmative action and will continue to increase its efforts. Too much has been accomplished to slow down at this time.

Thank you.

[The statement of Mr. Lightstone follows:]

PREPARED STATEMENT OF RONALD LIGHTSTONE

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE. I APPRECIATE THE OPPORTUNITY TO TESTIFY BEFORE YOU TODAY TO SHARE THE PERSPECTIVE OF MY COMPANY, VIACOM INTERNATIONAL INC., ON PERHAPS THE MOST IMPORTANT CIVIL RIGHTS ISSUE IN AMERICA: AFFIRMATIVE ACTION. I AM SENIOR VICE PRESIDENT, CORPORATE AND LEGAL AFFAIRS, FOR VIACOM, WHICH IS A DIVERSIFIED COMMUNICATIONS AND ENTERTAINMENT COMPANY. WE OPERATE CABLE TELEVISION SYSTEMS SERVING NEARLY 800,000 SUBSCRIBERS IN THE U.S. WE ALSO PROVIDE SATELLITE ENTERTAINMENT SERVICES FOR PAY TELEVISION TO MORE THAN 8.5 MILLION SUBSCRIBERS THROUGH OUR 50 PERCENT EQUITY POSITION IN SHOWTIME/THE MOVIE CHANNEL INC. VIACOM ALSO OWNS FOUR TELEVISION AND EIGHT RADIO STATIONS; OPERATES JOINTLY WITH HEARST CORPORATION AND AMERICAN BROADCASTING COMPANIES, LIFETIME -- ONE OF THE NATION'S LARGEST ADVERTISER-SUPPORTED SATELLITE CABLE TELEVISION NETWORKS; DEVELOPS AND PRODUCES PROGRAMMING FOR ALL MEDIA; AND DISTRIBUTES TELEVISION PROGRAMS, MOTION PICTURES AND TELEVISION COMMERCIALS TO NETWORKS AND STATIONS WORLDWIDE.

MY MESSAGE TO YOU TODAY--AND ONE THAT I BELIEVE IS SHARED BY A MAJORITY OF BUSINESS EXECUTIVES--IS STRAIGHTFORWARD; AFFIRMATIVE ACTION HAS BECOME A ROUTINE PART OF OUR ANNUAL BUSINESS GOALS. AND WE INTEND TO KEEP IT THAT WAY. WE ARE INVOLVED IN AFFIRMATIVE ACTION TODAY BECAUSE IT IS SIMPLY THE RIGHT THING TO DO.

AFFIRMATIVE ACTION HAS BEEN WOVEN INTO THE FABRIC OF AMERICAN SOCIETY FOR NEARLY 25 YEARS. A RECENT STUDY BY THE POTOMAC INSTITUTE HAS CONCLUDED THAT THE SIGNIFICANT PROGRESS TOWARD EQUAL OPPORTUNITY BY MINORITIES IS, AND I QUOTE, "DUE IN LARGE PART TO THE FEDERAL GOVERNMENT'S AFFIRMATIVE ACTION PROGRAM AND PRIVATE INDUSTRY'S ADOPTION OF IT."

WE IN THE BUSINESS COMMUNITY HAVE SPENT AN EXTRAORDINARY AMOUNT OF TIME AND ENERGY OVER THE YEARS WORKING OUT RULES AND PROCEDURES WITH THE GOVERNMENT. THIS INCLUDES THE FORMULATION OF REAL NUMERICAL MEASURES FOR PROGRESS, SOMETHING THAT EACH SIDE CAN UNDERSTAND.

AFFIRMATIVE ACTION HAS ALSO BEEN RICHLY ASSISTED BY MARKET FORCES. THIS CASE WAS STRONGLY PRESENTED IN A RECENT BUSINESS WEEK ARTICLE BY GARY S. BECKER, CHAIRMAN OF THE ECONOMICS DEPARTMENT AT THE UNIVERSITY OF CHICAGO. HE NOTED THAT, BETWEEN 1979 AND 1984, THE EARNINGS OF WOMEN COMPARED WITH THOSE OF MEN ROSE AT PROBABLY THE MOST RAPID RATE IN OUR HISTORY. YET, DURING MUCH OF THAT PERIOD, THERE WAS A RETRENCHMENT WITH RESPECT TO THE EQUAL RIGHTS AMENDMENT, HIRING QUOTAS, COMPARABLE WORTH, AND MOST AFFIRMATIVE ACTION PROGRAMS.

DR. BECKER NOTES THAT THIS OPPOSITION FAILED TO IMPEDE THE ECONOMIC GAINS OF WOMEN, WHICH SUGGESTS THAT LARGELY SILENT MARKET FORCES, AND NOT POLITICAL ACTIVITY, HAVE MAINLY DETERMINED THE ECONOMIC POSITION OF WOMEN IN OUR SOCIETY. THE GROWING COMMITMENT OF WOMEN TO THE LABOR FORCE, ESPECIALLY OVER THE LAST FEW DECADES, HAS HELPED TO REDUCE THE DIFFERENCE IN EARNINGS BETWEEN MEN AND WOMEN.

Dr. Becker cites some impressive statistics to support his position. From 1960 to 1980, the earnings of women compared with men rose significantly in Sweden, Italy, Britain and many other European countries. While similar earnings for American women were somewhat restrained during the 1960s and 1970s, partly due to the large number of employed women who had little work experience, it is clear that their earnings growth has been rising at a rapid pace during the 1980s.

During the past decade, far more women have entered medicine, law, accounting, and other well-paid and highly-skilled occupations.

One might conclude from Dr. Becker's position that market forces alone would be sufficient to provide equal employment and equal pay. Well, as much as I would like to say that business is entirely responsible, I can't.

Affirmative action has made great strides today because of a partnership between government and business. Because of its overall importance and impact on society, it is a concept that must be shared by these two institutions. Furthermore, we depend on each other to make affirmative action work. I see the political system as the originator and the breeding ground for debate and for new ideas on affirmative action. And I see business as the delivery system, the testing ground for those ideas.

This alliance of government and business is exemplified by the cable television industry's role in passage of the Cable Communications Policy Act of 1984. An integral part of that law is Section 634 regarding equal

EMPLOYMENT OPPORTUNITY. WHILE SOME OF YOU ARE FAMILIAR WITH THIS LEGISLATION, I BELIEVE IT IS IMPORTANT TO REVIEW THOSE ELEMENTS OF THE SECTION WHICH HAVE SUBSTANTIAL POSITIVE IMPACT ON AFFIRMATIVE ACTION.

THE ACT REQUIRES CABLE OPERATORS TO ESTABLISH AN AFFIRMATIVE EEO PROGRAM AND DIRECTS THE FEDERAL COMMUNICATIONS COMMISSION TO DEVELOP RULES BY SEPTEMBER 26 OF THIS YEAR WHICH REQUIRE CABLE OPERATORS TO: ENGAGE IN AGGRESSIVE OUTREACH PROGRAMS, RECRUIT APPLICANTS FROM SOURCES OF MINORITY REFERRALS, EVALUATE THEIR EMPLOYMENT PROFILES AND EXPLAIN DIFFICULTIES IN IMPLEMENTING THEIR EEO PROGRAMS; AND PROMOTE BUSINESS WITH MINORITY AND FEMALE VENDORS.

THE FCC WILL ALSO REQUIRE CABLE EMPLOYMENT UNITS WITH MORE THAN FIVE FULL-TIME EMPLOYEES TO FILE ANNUAL STATISTICAL REPORTS WITH THE FCC, IDENTIFYING BY RACE AND SEX THE NUMBER OF FULL-TIME AND PART-TIME EMPLOYEES IN SEVERAL SPECIFIED JOB CATEGORIES. REPORTS MUST ALSO INCLUDE NUMBERS OF WOMEN AND MINORITIES IN THE RELEVANT LABOR MARKET FOR SUCH JOB CATEGORIES.

WHILE THE ACT DOES NOT SPECIFY PRESCRIBED NUMERICAL EMPLOYMENT PARITY LEVELS OR EMPLOYMENT QUOTAS, CABLE OPERATORS ARE REQUIRED TO MAKE THEIR "BEST EFFORTS" TO AFFORD EQUAL EMPLOYMENT OPPORTUNITY.

AS A MATTER OF PRINCIPLE, VIACOM OPPOSES QUOTAS. BUT WE DO FIRMLY BELIEVE THAT THE FCC'S PROPOSED EEO PROCESSING GUIDELINES CAN AND SHOULD BE USED NOT AS AN ULTIMATE TEST OF COMPLIANCE, BUT AS AN INITIAL SCREENING DEVICE. IN THIS MATTER, EEO EFFORTS AND NOT NUMERICAL LEVELS OF MINORITY AND FEMALE EMPLOYMENT, BECOME THE BASIS OF A GRANT OF CERTIFICATION AND A FINDING OF COMPLIANCE WITH THE CABLE ACT.

THE FCC WILL ANNUALLY CERTIFY ALL ENTITIES FOUND TO BE IN COMPLIANCE WITH THESE SPECIFIC EEO PROVISIONS AND AT LEAST ONCE EVERY FIVE YEARS. THE COMMISSION MUST CONDUCT A MORE DETAILED INVESTIGATION OF THE EMPLOYMENT PRACTICES OF EACH UNIT TO ENSURE COMPLIANCE. THERE ARE SUBSTANTIAL PENALTIES FOR FAILURE TO COMPLY AND THE FINDING OF THREE SUCH FAILURES WITHIN A SEVEN-YEAR PERIOD COULD RESULT IN THE REFUSAL OF FRANCHISE RENEWAL TO THE CABLE OPERATOR.

MY POINT IN REVIEWING THESE PROVISIONS OF THE ACT IS TO SHOW THAT THE CABLE TELEVISION INDUSTRY, WHICH SUPPORTED THE CABLE ACT, IS PREPARED TO MOVE FORWARD TO FOSTER MINORITY EMPLOYMENT.

A RECENT SURVEY OF 128 MAJOR COMPANIES REVEALED THAT 95 PER CENT OF THEM PLANNED TO USE HIRING-AND-PROMOTION GOALS EVEN IF THE GOVERNMENT STOPPED REQUIRING THEM.

THIS POSITION WAS FURTHER SUPPORTED LAST FEBRUARY BY THE NATIONAL ASSOCIATION OF MANUFACTURERS. THEIR EEO PANEL VOTED NOT TO BACK PROPOSALS WHICH WOULD WEAKEN THE PRESIDENTIAL ORDER REQUIRING GOVERNMENT CONTRACTORS TO ESTABLISH AFFIRMATIVE ACTION PLANS. FURTHERMORE, THE GROUP PASSED A RINGING ENDORSEMENT OF AFFIRMATIVE ACTION AS A SOCIAL POLICY WHICH HAS WORKED AND SHOULD BE KEPT.

THE HEAD OF THE GROUP'S EQUAL EMPLOYMENT PANEL SUMMED IT ALL UP WHEN HE SAID THAT, "GOALS AND TIMETABLES ARE UNDERSTOOD AND ACCEPTED BY BUSINESS." AT THE SAME TIME, A HUMAN RESOURCES EXECUTIVE FROM FORD MOTOR COMPANY STRESSED THAT AFFIRMATIVE ACTION IS "A WAY OF LIFE" FOR BUSINESS.

WELL, GENTLEMEN, IT IS THE VITAL TRIAD OF GOVERNMENT, BUSINESS AND SOCIAL INSTITUTIONS WHICH WILL ALLOW US TO MAKE FUTURE PROGRESS ON AFFIRMATIVE ACTION AND RELATED PROGRAMS. WHILE WE HAVE MADE PROGRESS IN EQUAL EMPLOYMENT, WE HAVE A LONG WAY TO GO. FOR EXAMPLE, WHAT ABOUT THE 43 PER CENT UNEMPLOYMENT RATE AMONG BLACK YOUTH, WHICH IS CLEARLY LINKED TO AFFIRMATIVE ACTION AND WHICH LABOR SECRETARY BROCK HAS RIGHTFULLY LABELED "A NATIONAL TRAGEDY?" CAN ONE MEMBER OF THE TRIAD FAIRLY BE EXPECTED TO COME UP WITH A SOLUTION ON ITS OWN? THE ANSWER, OF COURSE, IS NO.

I HAVE COME HERE TODAY NOT TO OFFER ALL OF THE SOLUTIONS TO THE NATION'S EMPLOYMENT PROBLEMS, BUT TO STRESS THE NEED FOR CONTINUED COOPERATION BETWEEN GOVERNMENT, BUSINESS AND OUR SOCIAL INSTITUTIONS. I BELIEVE THAT MOST OF THE BUSINESS COMMUNITY IS CONVINCED OF THE CONTINUED NEED FOR AFFIRMATIVE ACTION AND WILL PRESS ON REGARDLESS OF CURRENT GOVERNMENT ACTIVITY TO THE CONTRARY. TOO MUCH HAS BEEN ACCOMPLISHED AND TOO MANY HAVE BENEFITTED FROM AFFIRMATIVE ACTION FOR US TO STOP NOW.

THANK YOU.

# # #

Mr. EDWARDS. Thank you very much, Mr. Lightstone.
Mr. Hawkins.

Mr. HAWKINS. Certainly I would like to commend you, Mr. McEwen, and you also, Mr. Lightstone, for your very constructive statements and contribution to this hearing.

I believe there is certainly very little with which any of us can disagree. The only issue the use of quotas.

May I ask you both are there any instances in which quotas should be a part of a remedy fashioned by the court? Let us assume, for example, that there is a recalcitrant employer that continues to discriminate and refuses to show good-faith efforts in upholding the law. Are there certain instances where the court might tailor a remedy in that instance in order to comply with the law and might use, as the courts have done, the use of numerical quotas?

Mr. MCEWEN. I think it goes without saying that the use of quotas as a remedy for blatant, identified discrimination—there is no question about that. I think that title VII clearly covers that, and there is room in our law to take care of that.

What we were talking about and what I was trying to make perfectly clear is that, when we are talking about affirmative action programs and we are talking about the executive order, it was not based on the need or the use of quotas; it's on goals and timetables.

Again, as I emphasized, the whole concept of good faith seems to have gone out the door, and that's where this problem comes in.

The use of quotas we have no problem with on a court-ordered bases where discrimination has been identified. We are talking about, and our statement had to do with, voluntary compliance programs in the absence of identified victims of discrimination, where you are talking about trying to improve representation, as opposed to blatant, ongoing discrimination.

Mr. HAWKINS. I certainly agree with you. I think that has been the tendency in most of the cases that I've had an opportunity to review. We both agree that numerical goal setting is a good business practice.

However, the possibility of setting a remedy in terms of a numerical quota would be available in certain instances. I think we would agree on that formulation.

How would you respond to the same question, Mr. Lightstone?

Mr. LIGHTSTONE. While we do not believe in quotas, we do believe in numerical guidelines and goals. However, under the Cable Act, section 684, the penalties for failing to comply with the EEO policy under that act are actually more severe than quotas, because the FCC has the authority to deny franchise renewal, which effectively would put a company out of business, if it fails to comply with the EEO guidelines—not the quotas but the EEO guidelines.

So a company that was not making the appropriate efforts would be faced with more severe penalties than using quotas.

Mr. HAWKINS. Mr. McEwen, on page 8 of your statement, you suggested that the OFCCP has, as a matter of practice, implemented the changes to the existing regulations without officially changing them through the administrative rulemaking process. Would you elaborate on that and indicate in what way has the OFCCP unofficially allowed contractors to use standards not in the regulations

Mr. McEwen. The OFCCP has practiced in the past everything from podium policy, where they have indicated that certain procedures and policies are going to be changed without submitting them to OMB for review or putting them in the Federal Register for review. That has been done.

What I don't want to do is, I don't want to focus a lot on that particular issue, because I think that it only serves to cause a schism between the business community which I don't think we need right now.

What we are saying is that, to be sure, the Executive Order Program is not perfect. The Executive Order Program can be improved upon. But what we are also saying is that we are objecting a lot to what we have seen recently in the press and what has come out in some of these hearings as almost "we" against "they." It shouldn't be that way. I think we are all working for the same end. It's just that we have in business some philosophical differences as to the vehicles to be used in getting there.

If I were king and I had my way, I would do away with the term "affirmative action," period. That would help a lot. I think I would use a term like "work force diversity."

If you believe that the diverse cultures in this country, coming from Europe and so on, made this country great, you also could subscribe to the thing that diversity in the work force and in the people could make our companies great.

Therefore, any program that you are talking about to increase the diversity within a company, so that we are using all the human resources available to us, is something that we could all subscribe to, and it would get away from some of these red herring type things.

Again, OFCCP does have its problems. I think we are really suffering—to get back to your question, really—we are really suffering from a lack of leadership there. Some of the stuff that has been occurring possibly would not occur if we had had someone in there who could help to formulate policies, and right now we don't, and they're getting mixed direction. It's a problem for us.

Mr. Hawkins. On page 6, you dealt with that in terms of conflicting policies among the various agencies—EEOC, OFCCP, et cetera.

Mr. McEwen. Yes.

Mr. Hawkins. That has been the subject of much concern before this committee.

Mr. McEwen. Sure.

Mr. Hawkins. Previous testimony seems to indicate that the EEOC did not take seriously its role as the lead EEO enforcement agency. I cannot help but believe that that has been a breakdown, and that it has been the source of much annoyance to this committee. The mixed signals that the various enforcement agencies have been giving are disconcerting to employers and to us as well.

I think that is one source of difficulty that this committee should proceed to correct. It is clearly a mandate that these agencies take the lead from the EEOC.

Your testimony indicates that you are still getting those mixed signals, and I think that is disgraceful after all of the years in which we have had the various agencies before this committee and indicating to us that they were trying to consolidate their enforcement powers and to clarify the responsibilities under the law.

Thank you, Mr. Chairman.

Mr. **Edwards**. Thank you, Mr. Hawkins.

I join the chairman of the Education and Labor Committee in complimenting both witnesses on your attitude and your organizations' views on affirmative action. Affirmative action is clearly in the best interests of the country and of all the people, and it's very refreshing for us to listen to your explicit and fair explanation of the policies of your organizations.

With regard to paperwork, we hear that a lot in Government. I might suggest, Mr. Lightstone, that if you find paperwork to be burdensome, and you can see as a businessman—you are a successful business person—where the paperwork is unnecessary and where it ought to be cut down to one or two pages or something, you ought to do a little homework and then bring it to us. We are always glad to see horrible examples of unnecessary work.

Unfortunately, bureaucracies like to gather paper, and we fight to cut them back. I think it's a good rule that if you can't say it in one page then it's not worth saying. So keep that in mind. It would be helpful to us.

Mr. **Lightstone**. Thank you.

Mr. **Edwards**. Mr. Lightstone, do you, as an employer, find that these numerical measures—these goals and timetables—are helpful in achieving a broad-based work force?

Mr. **Lightstone**. Yes, Mr. Chairman.

Mr. **Edwards**. Has cable industry been put into difficulty or hampered in day-to-day work by adherence to affirmative action programs?

Mr. **Lightstone**. Not to date. Of course, the provisions of the Cable Act are just now going into effect, and in fact the Commission will be issuing some guidelines in the near future—I think by the end of September—but we don't anticipate any serious problems in complying with the act.

Mr. **Edwards**. We understand that the FCC may soon reverse the processing guidelines and strike out the use of numerical goals as a screening device. What is your reaction to that?

Mr. **Lightstone**. We, VIACOM, would not support the elimination of those guidelines, nor do I believe that it is consistent with the intent of the Congress in passing the Cable Act.

Mr. **Edwards**. In other words, you would go ahead with your own guidelines and goals on your own as a voluntary measure?

Mr. **Lightstone**. Yes.

Mr. **Edwards**. Good for you.

Mr. McEwen, what would happen if affirmative action were suddenly declared illegal, like the Justice Department would like to have happen? How would this impact on minority workers?

Mr. **McEwen**. One of the biggest byproducts of affirmative action is that it has taught us to do a lot of things that we thought we were doing already better, among which is utilizing all the resources that are available to us.

There is a lot of rhetoric about affirmative action that one of the big things that it has done is gotten unqualified people into jobs who shouldn't be there, and people worry about tokenism and so on. There is another side to that story.

One of the things that affirmative action has done is, it has gotten before us people who were already qualified and, but for the fact that they were born of a certain sex or certain race, they didn't get the opportunity.

So what we have learned from practicing affirmative action is, up until the time that we were forced to do a better job in looking at people, we were missing a whole type of resource out there that we weren't really tapping.

So to the extent that if affirmative action were eliminated tomorrow, because we know that there are a group of people out there who have a lot of talent and a lot of contributions to make that we hadn't tapped before, we would continue to seek the same type of work force diversity that we have been seeking up until this time.

There is another point that is generally overlooked. Those restrictions that affirmative action knocked down for minorities were also restrictions that were keeping a lot of nonminorities from realizing their full potential, too.

When we had laws that said that you couldn't get beyond a certain point because you didn't have a high school diploma or those types of things, and in the name of affirmative action we broke those laws down, there were a lot of white, Anglo-Saxon, Protestant males who had a lot to contribute to companies who got no further than certain job levels because they didn't have a degree, who have been helped by affirmative action also.

So in the sense of what we have learned from business, whether we call it affirmative action, whether we call it business diversity, whether we call it whatever, we would still continue to practice the type of work force diversity program that many of us are practicing now.

Mr. EDWARDS. Thank you.

I'm going to recognize the gentleman from Michigan in just a second, but let me say, my final comment is that the National Association of Manufacturers deserves to be congratulated. You have come a long way. We appreciate it, and I'm sure the country does as a whole. You are a very important organization out there. You represent jobs and homes and all the things that go to make up our country, and to have this attitude toward civil rights is very encouraging to us.

Now I yield to the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I just wanted to congratulate Mr. McEwen on his testimony for NAM. From what I have heard and been told by staff and my colleagues here, we are in agreement, and I hope that we can get this idea across.

I don't know who it is we are battling. If NAM is with us, what's left?

Of course, Mac, you're a product of affirmative action yourself. NAM doesn't have that many black people working for it—right?

Mr. MCEWEN. That's right. There are not many black Senators either.

Mr. **Conyers**. Pardon?

Mr. **McEwen**. You're right.

Mr. **Conyers**. Go ahead.

Mr. **McEwen**. You're right.

Mr. **Conyers**. I thought you were adding something else.

Mr. **McEwen**. No. It was just a parenthetical expression. You're right.

Mr. **Edwards**. If the gentleman would yield, next week the Heritage Foundation is going to testify in favor of affirmative action, too.

Mr. **Conyers**. Oh, good night. I hope we bring girders into the ceiling so it won't fall down during their testimony.

Mr. **Edwards**. I'll scratch that remark later.

Mr. **Conyers**. I don't have any further questions, Mr. Chairman, but I understand that tomorrow William Bradford Reynolds is coming before these subcommittees.

Do they understand at the Department of Justice that their testimony is to be submitted—I know he has been there 4 years—that his testimony is to be submitted in final form 24 hours before he testifies? I want to see it. For one time, I want to see it in advance.

Mr. **Edwards**. In response to the gentleman from Michigan, I generally don't answer for Mr. Reynolds, but we will ask Mr. Kiko, counsel for the minority, in a moment, the same question.

Mr. **Conyers**. OK. I'm hoping we can do that, so we can have as orderly a hearing tomorrow as we are having today.

Mr. **Hawkins**. If the gentleman would yield, I think we should ask whether it is available now.

Mr. **Edwards**. Mr. Kiko?

Mr. **Kiko**. No, I haven't received any testimony yet.

Mr. **Edwards**. If Mr. Kiko doesn't have it, nobody will have it.

Mr. **Conyers**. Could you put in a call right away, sir, and tell the head of the Civil Rights Division that Congressman Conyers raised this point, so that we will be able to see the testimony today—I want to read that testimony tonight. He's already violating the 24-hour rule according to the chairman of the Education and Labor Committee, but I would like to get it within 12 hours maybe.

I don't want him strolling in here, handing out his testimony at the same moment that he sits down. You know, we've got to run a little more orderly shop. What he says is still important. He's still the head of that division.

I yield back the balance of my time.

Mr. **Edwards**. Thank you, Mr. Conyers.

Mr. Kiko.

Mr. **Kiko**. I have a question for Mr. McEwen.

You did state that title VII clearly allows the use of quotas as a remedy, in response to a question, and I'd like to know what part of title VII clearly states that quotas are acceptable.

If I could quote from the legislative history in the *Stotts* opinion, the Supreme Court quoted a memorandum by Republican House sponsors, they state, "title VII does not permit the ordering of racial quotas in businesses or unions."

I have looked through title VII, and I have not seen the word "quota" used as an acceptable remedy for past discrimination.

Mr. McEwen. Let me clarify what I said for the record. What I was implying there is, really, it's the courts' interpretations of Title VII that have allowed the quotas, not Title VII itself.

But we know the effect of Title VII has been defined primarily by case law, and it's the court interpretations that I was referring to. You won't find it in Title VII.

Mr. Kiko. If the Supreme Court in the *Stotts* case used that as legislative history, now that we have a Supreme Court that said that, do you think that that should be the rule, as opposed to lower court opinions?

Mr. McEwen. Our civil rights history has never been built upon one court case, and one of the things that is surprising to me is how much many of us can pull out of a *Stotts* decision and the implications that we have across the board to civil rights when *Stotts* was limited only to seniority, to layoffs; to recall it has nothing to do with voluntary compliances we are talking about here; and I think we have just as much editorial license to interpret *Stotts* as someone else does.

All I'm saying is, from the standpoint of whether or not we can take from *Stotts* the fact that quotas can be allowed or cannot be allowed, I think it still remains to be seen what case law is going to do. That's as much as I can say there.

Mr. Kiko. OK.

Mr. Lightstone, I have a question regarding a comment in your written statement. You said that affirmative action has made great strides today because of a partnership between Government and business. I have read a lot of horror stories about OFCCP and how they enforce the regulations. We have heard from Mr. McEwen.

I'd like to quote a statement that was made by Robert Thompson of the Chamber of Commerce on goals and timetables. He said:

> As we pointed out in our statement, the distinction between goals and timetables is easily blurred. Because OFCCP's enforcement of the program focuses on numbers and how those numbers are achieved, it is extremely questionable whether a contractor views them as anything other than quotas. Even though the program is intended to recognize the good faith efforts of contractors in meeting goals and timetables, in practice OFCCP has given little credence to these efforts.

This doesn't sound to me like a partnership between government and business. Maybe your experience has been a little different with the FCC, but it certainly doesn't seem to me to be the case with OFCCP.

If you would like to comment on that, too, Mr. McEwen, you can.

Mr. Lightstone. My only comment is no, our experience has not been the same as Mr. Thompson's. We have not had a problem, nor do we anticipate there being a problem.

Mr. McEwen. I'd like to comment, and I'd like to say that I'm looking at it from a jaundiced eye.

Somewhere back in my dark past, I worked for the Federal Government as a compliance officer, and one of the things that amazes me is that the people who are caught in the middle of all of this are those compliance officers working for the OFCCP and for other agencies like that who, on the one hand, are having to implement or try to implement the regulations that are promulgated, and they hear certain directions coming from their superior, and business is fighting them on the other hand.

But to get back to your particular question, I think you have to go beyond OFCCP, and if there is not a partnership between business and the OFCCP, we can lay it at the doorstep of Congress actually, because if you look at an agency like OFCCP and you ask the question to yourself, what determines how they are funded? When they come before hearings for appropriations, what do you look at? All too often, you look at the amount of backpay that they have extracted from people, you look at the numbers of conciliation agreements, and letters of commitment, and all that type of thing.

So to the extent that they are pushed to demonstrate their productivity based on those types of factors, they are going to be out there pushing for those, which means that there is going to be some conflict. But, by and large, we have been able to overcome those conflicts. OFCCP has gone a long way.

In our testimony, we said in recent years they have done a lot better. There has been a conscientious effort to get a partnership going through liaison programs, through a whole lot of other factors that they are using, to do a better job, and they are not all bad. They have their problems, but they are not all bad. They are not a monolith. There are differences in effectiveness within the OFCCP itself, just like in any other organization.

Mr. KIKO. I have no further questions.

Mr. EDWARDS. Mr. McEwen, Mr. Lightstone, and Mr. Conway, thank you very much for excellent testimony.

The Subcommittee will adjourn now until tomorrow morning at 9:30 in room 2175 of this building. Thank you again.

[Whereupon, at 12:30 p.m., the subcommittees were adjourned, to reconvene the following day at 9:30 a.m., in room 2175, Rayburn House Office Building.]

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AFFIRMATIVE ACTION

THURSDAY, JULY 11, 1985

House of Representatives,
Subcommittee on Civil and Constitutional Rights,
Committee on the Judiciary,
and
Subcommittee on Employment Opportunities,
Committee on Education and Labor,
Washington, DC.

The subcommittees met, pursuant to call, at 9:40 a.m., in room 2175, Rayburn House Office Building, Hon. Don Edwards (chairman of the Subcommittee on Civil and Constitutional Rights) presiding.

Present: Representatives Edwards, Martinez, Hawkins, Clay, Schroeder, Hayes, Sensenbrenner, DeWine, and Gunderson.

Staff present: Eric P. Jensen, acting staff director; Paul Cano, legislative assistant; Genevieve Galbreath, clerk/staff assistant; Patricia L. Kelly, staff assistant; and Beth Buehlmann, Republican staff director for education of the Subcommittee on Employment Opportunities of the Committee on Education and Labor; Catherine A. Leroy, counsel; Stuart J. Ishimaru, assistant counsel; and Philip Kiko, associate counsel of the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary.

Mr. Martinez [acting chairman]. This is the joint hearing between the Subcommittee on Employment Opportunities of the full Education and Labor Committee and the Subcommittee of the Judiciary Committee, the Subcommittee on Civil Service and Constitutional Rights.

Chairman Don Edwards is a little late, and he will be acting as Chair today, but I'll take his place until he gets here to assume the chair.

I would like to make an opening statement.

The testimony given at our yesterday hearing, the first of these two hearings, established, in my mind, the importance of affirmative action as a vital component of any employment policy or practice aimed at eradicating the effects of discrimination in the workplace.

We heard from employers and scholars who all agreed that successful minority participation yields benefits for all of society, and success indeed has followed sincere efforts by employers in the private and public sectors to implement affirmative action policies aimed at affording minority workers an equal opportunity to compete with their majority counterparts.

Yet despite the repeated affirmation of the affirmative action success by private and public employers and the stated necessity to continue such policies, the shadow of the administration's long reach continues to chill the full fruition of equal opportunity laws.

Every legal forum is crowded with the administration's men of gloom, seeking to undo 30 years worth of hard won civil rights gains. Whether the case is *Stotts, Bob Jones, Grove City*, or *Wygant*, and whether the laws are Title VII, Title VI, or Title IX, the Fair Housing Act, or the 14th or 15th amendments, the administration's intentions are clear: To wage comprehensive war on affirmative action and reverse all the gains made by minorities under the law.

While the administration's claims of protecting white males from discrimination are laudible, the administration's simultaneous rhetoric of expanding the civil rights enforcement for minorities is shamelessly duplicatous. The battleground is the law, but the prize is the lives of countless human beings.

Fifty-two jurisdictions are being asked by the Justice Department to undo positive efforts undertaken to reverse discriminatory practices of the past.

I am very proud of the resistance raised by the united stand of the U.S. Conference of Mayors, the National Conference of Black Mayors, and all the civil rights groups, for to lose this war over affirmative action would cause the productivity of an entire population of minority American citizens to be thrown away in a junk heap. We simply cannot afford to stand by and allow the struggle to be lost or forfeited.

Thank you.

Mr. Sensenbrenner.

Mr. **SENSENBRENNER**. Thank you very much, Mr. Chairman.

I guess the chairman has set the tenor of this hearing, and it looks like it's going to be one of our usual contentious hearings on the civil rights questions.

Unfortunately, the chairman's rhetoric doesn't match up with the facts. I think that the Justice Department has come up with a solid list of accomplishments, not ballyhooed accomplishments but accomplishments in the civil rights area.

I would like to particularly take issue with the chairman's statement that, in the area of fair housing, the administration has done nothing.

When the full Education and Labor Committee and the Subcommittee on Civil and Constitutional Rights held a hearing in Chicago, one of the majority party's witnesses who represented the Chicago Fair Housing Council had effusive praise for Mr. Reynolds and the Civil Rights Division of the Justice Department as being the most helpful in alleviating discriminatory practices in the housing field compared to the actions of previous administrations, both Republicans and Democrats.

I would also remind the chairman that in the last Congress the administration did introduce a fair housing bill—it was cosponsored by former Senator Baker and myself—that the majority party absolutely refused to take action on in the Subcommittee on Civil and Constitutional Rights.

So the foot-dragging is not on the part of the Reagan administration. The foot-dragging is on the part of the partisan idealogues that control the House of Representatives and the subcommittees and committees that handle civil rights questions.

I'm particularly happy to welcome Mr. Reynolds back before this subcommittee. I'm very happy to see that he is here, particularly after my friends in the civil rights groups and the majority party did such a number on him in the Senate. I guess that means that we will have you in charge of the Civil Rights Division for the next 4 years, and they've got nobody to blame but themselves for that.

So welcome, Mr. Reynolds, and I'm looking forward to your testimony.

Mr. **MARTINEZ**. Thank you, Mr. Sensenbrenner.

[A statement by Congressman Pat Williams follows:]

STATEMENT ON AFFIRMATIVE ACTION 7/11: - Pat Williams

I commend the committees for holding these important hearings on affirmative action. This process allows us in Congress to once again state our strong commitment to affirmative action which has significantly contributed to equal opportunity for all of our citizens. Affirmative Action has become an accepted and effective way to end discrimination. It recognizes that a serious commitment to equality is not measured by rhetoric but rather by results. After initial struggle and then adjustment, we have moved to solid cooperation between the federal government and state and local governments and between the federal government and the private sector in setting goals and developing strategies and timetables to hire women and minorities in all jobs. Affirmative action has benefitted us all by allowing full utilization of all of the talents in our society to meet the challenges of the future.

Studies have shown that affirmative action has contributed to the substantial gains of women and minorities in blue collar and management and professional jobs. Even more important affirmative action has helped create an attitude which has permeated other arenas such as training and education. However, as we heard before these subcommittees yesterday, affirmative action enforcement is still needed--particularly in the new high technology and high growth industries.

Affirmative action is the law of the land and has been vigorously enforced by both Democratic and Republican administrations for twenty years. Now the Justice Department has not only refused to enforce affirmative action but has attempted to reverse the progress which many localities across this country have cooperatively negotiated. After the Stotts Supreme Court decision the Justice Department requested that 50 public jurisdictions re-open their affirmative action settlements. 47 refused. Still the efforts go on to undermine meaningful equality in this country. I look forward today to being able to have a dialogue with those involved in pursuing and enforcing affirmative action to clearly restate our Congressional commitment and to hear how our legislative mandate is to be carried out.

Mr. **Martinez**. Our first witness will be Mr. William Bradford Reynolds, assistant attorney general of the Department of Justice Civil Rights Division.

The Chair would like to announce that all prepared statements will be entered in the record in their entirety, and the witnesses need only summarize and highlight their testimony.

With that, Mr. Reynolds, would you like to begin?

TESTIMONY OF WILLIAM BRADFORD REYNOLDS, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Mr. **Reynolds**. Thank you, Mr. Chairman.

I'm pleased to be here, and I do have a prepared statement that I will not read but would ask that it be made part of the record.

As I understand the thrust of the hearing today, it is to focus primarily on the Department of Justice's activities following the Supreme Court decision in *Firefighters Local Union 1784* v. *Stotts*, a decision that we believe announced very clearly, from the highest court in the land, that courts could not use race-conscious preferential devices in devising relief under title VII in the employment discrimination area.

That reading of the decision prompted us to contact a number of jurisdictions where we had entered into consent decrees at an earlier point in time and where the Justice Department was a party. Those consent decrees contained provisions that very clearly and very directly contained preferential quotas for the most part—I think probably that is a fair characterization—preferential quotas in the hiring and promotion end of the decree.

We felt that after *Stotts* those were impermissible as discriminatory activities that could not go forward in the further implementation of those decrees, and we asked the jurisdictions to enter into a modification of the decrees with us and to go back to the courts and remove the discriminatory features of the decrees so that they would be nondiscriminatory in their entirety. They would contain affirmative action—which I do agree with you is a vital component of employment policies throughout the whole employment spectrum—these decrees would contain affirmative action features, but they would not have embedded in them any license to use, for future hiring and promotions, quota relief that would advantage some and disadvantage others simply on the basis of skin color or gender.

That initiative has received quite a bit of attention, as you alluded to. There have been appellate courts that have reviewed it and indicated a contrary interpretation of *Stotts* to the one that we have taken, and, in light of the fact that the issue has been joined in the courts, as we think is proper, we are hopeful that we will get a clarification out of the Supreme Court in the very near term on what the intent was of the Supreme Court in its *Stotts* decision.

I would simply advise the committees that we have filed as recently as, I believe, last week a brief in the Supreme Court in the *Wygant* case, where the issue is presented in a bit different context than in *Stotts*, raising the question of the constitutionality of quotas or race-conscious preferences in the employment arena.

We think that that case will help in large measure to clarify this area to the extent that there seems to be some degree of confusion after *Stotts*. There are also four appellate court decisions that have come down that directly speak to the interpretation of *Stotts*, three of which are now, I believe, in the Court on petitions for certiorari, and the fourth of which, I understand, is also to be filed with the Court on a petition for certiorari. I believe that this will give us an opportunity, and the Court an opportunity, with *Wygant* and those four appellate court decisions, to speak definitively to this area and to resolve whatever differences might exist on the legal side of the permissibility of this kind of relief.

Having said that, Mr. Chairman, I certainly am ready and prepared to answer whatever questions the committee might have and would ask only that my full statement be submitted for the record.

Mr. EDWARDS [presiding]. Thank you, Mr. Reynolds.

Your full statement will be made a part of the record. I have not had the privilege of reading it, inasmuch as it didn't get to my office yesterday.

[The statement of Mr. Reynolds follows:]

Department of Justice

TESTIMONY

OF

WM. BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
COMMITTEE ON THE JUDICIARY

AND

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES
COMMITTEE ON EDUCATION AND LABOR
U. S. HOUSE OF REPRESENTATIVES
AFFIRMATIVE ACTION AND EQUAL EMPLOYMENT
OPPORTUNITY ENFORCEMENT

JULY 11, 1985

Mr. Chairman and Members of the Committee:

I welcome this opportunity to discuss again the policy and practices of the Department of Justice and this Administration in the critical area of the enforcement of equal employment opportunity laws. As the Assistant Attorney General for Civil Rights, it is my sworn duty as a law enforcement official, to uphold and enforce the Constitution and laws of the United States. Throughout the first four years of my tenure, I have been meticulous in carrying out that mandate, adhering faithfully not only to the letter and spirit of the Fourteenth Amendment and Title VII, but also to relevant Supreme Court precedents. The record bears this out.

My testimony today has two principal themes. First, I want to bring again to this Committee's attention the fact that for the past four years the Civil Rights Division of the Department of Justice has pursued a policy of vigorous enforcement of the equal employment opportunity laws; and that the Administration and I are committed to continuing this policy with the same intensity for the next four years. Second, I wish to discuss the areas in which the Administration has made changes and explain the reasons for those changes. In this regard, I want particularly to focus on our understanding of the Supreme Court's decision last year in the Stotts case (Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576, (June 12, 1984), and describe the efforts underway to obtain from the Supreme Court further clarification of that decision and its application to cases throughout the country.

1. The Civil Rights Division has in the last four years looked for, found and brought lawsuits against public employers that engage in employment practices that discriminate unlawfully against persons on the grounds of race, color, sex, religion and national origin. We will continue to do so. And we have been successful in the great majority of the cases we have brought.

In the period from January 20, 1981 through January 19, 1985, we filed a total of forty-nine (49) new suits against employers alleging violations of the equal employment opportunity laws we enforce. (That number compares favorably to the forty-one (41) such suits filed in the prior administration between January 20, 1977 and January 19, 1981.) Forty-seven (47) of our employment cases were brought on behalf of blacks, hispanics and/or women or for the female spouse of male employees. One suit alleging religious discrimination was brought on behalf of a Jew, and one alleging discrimination on grounds of national origin was brought on behalf of an Iraqui. During this period, we obtained a total of fifty (50) court decrees, including four additional decrees which had been agreed to by the parties and submitted to the court but not yet entered. Those four decrees have subsequently been approved by the court and entered. In this connection, we have secured $9,635,969 in back pay for victims of discrimination during the past four years, as compared to $7,505,850 in back pay awards secured during the prior four years.

While the overwhelming majority of our employment cases were brought to stop and reform employment practices which are unlawful under controlling precedents of equal employment opportunity law, we were not content to rest with settled law. Two of our cases, for example, are sufficiently novel to warrant special mention here.

In United States v. Town of Cicero (N.D. Ill. 83-C-0143) we brought a suit alleging both purposeful exclusion of blacks from housing in the Town of Cicero, in violation of Title VIII of the Civil Rights Act of 1968, and unlawful employment practices tied in no small part to a durational town residency requirement for municipal employment, which violates Title VII of the Civil Rights Act of 1964. This suit was the first combined housing and employment case ever brought by the Department and we believe is the first to challenge a durational residency requirement under Title VII. Extensive discovery has been undertaken in the case, producing evidence that has led to my authorization of full investigations against eleven (11) other municipalities in the Cook County area. For a number of months we have sought a hearing on our motion for a preliminary injunction against the durational residency requirement and other discriminatory employment practices in that case and the hearing was held on July 3 and July 5. Trial on the merits is expected in the next six to nine months.

In United States v. Rhode Island Department of Employment Security (D.R.I. Civ. No. 83-0541), we brought suit against a state agency which administers a state law providing for temporary disability benefits to employees of employers doing business in Rhode Island. We alleged that because the state law discriminated against pregnant workers in violation of Title VII, the state agency was interfering with the rights guaranteed by Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act of 1978. The case was filed in September 1983 and was decided favorably to our position by a district court memorandum and order of September 4, 1984. The issues of relief were submitted to the court on an agreed upon statement of facts in November 1984, and briefing was completed early this year.

This case is the first in which the United States has sought to hold a State financially responsible (through its disability benefit fund) for interfering with Title VII rights. If we prevail on the relief issue, we estimate that there will be monetary awards to approximately 9000 women in an amount of well over $1,000,000.

The pace of our enforcement program continues. As previously noted, all of the the four decrees submitted prior to January 19, 1985 have been approved and entered by the court.

Four additional suits have been filed and four additional suits have been authorized. Three additional cases are presently close to settlement. In an authorized (but not yet filed) suit against a municipal prison system, the defendant city has agreed to a consent decree providing for the hiring and assignment of women to most correctional jobs and priority job offers and $950,000 in backpay to more than 200 women who have been identified as having suffered from the city's sexually based hiring, assignment and promotion practices. The decree in that case has been approved by me and by the defendant city and has been submitted to the local union for comments and agreement.

Shortly before the scheduled trial on June 17, 1985, in United States v. City of Gallup (D.N.M., Civ. No. 83-1395M), the parties reached an agreement on a consent decree in that case, providing priority job offers and $750,000 in backpay to more than 230 American Indians who were harmed by prior pactices of the city. The form of a consent decree is under discussion and expected to be submitted to the court in the near future.

Similarly, in United States v. City of Alexandria, et al. (No. 77 2040, Sec. I), we have reached agreement with the City of Lafayette for a decree resolving a complaint alleging racial discrimination against blacks in the municipal fire and police departments. Like the decree in Gallup, the decree will provide for enhanced recruitment (of blacks), and priority job offers and $235,000 in back pay to 87 persons harmed by prior practices of the city.

In addition to the foregoing, we had a trial in February under a consent decree on the use of a promotional test for fire captain administered by the State of New Jersey for municipal fire departments. Briefing on that case was completed in June and we are awaiting a decision. A trial involving the use by Nassau County, New York, of an examination for entry level police officer developed by the Center for Occupational and Professional Assessment (COPA) of the educational Testing Services of Princeton, New Jersey commenced on Monday, July 15. In Nassau, as in the New Jersey case, we are contending that the use of a test was discriminatory in violation of a consent decree. Not only is the issue an important one for Nassau County which has one of the largest police forces in the United States; but it may also constitute a precedent for other police departments, since we understand that there are over three hundred (300) police departments throughout the United States using similar tests developed by COPA.

In short, we have to date been pursuing an effective enforcement program to insure equal employment opportunity for all Americans. No significant changes are contemplated.

2. This brings me to my second point. As most of you know, I am no newcomer to the debate over quota relief -- sometimes described as "affirmative action" -- in the employment

area. Indeed, I much earlier announced my position and the position of this Administration to the public in testimony before this Subcommittee on September 23, 1981. I have attached a copy of my testimony on that occasion to my prepared statement for your convenience.

In that testimony, and on repeated occasions since that time, I have set forth our position. It is, in essence, that this Administration enthusiastically endorses use of affirmative measures, such as recruitment and outreach programs, to bring increased numbers of minorities and women into the workforce, and has insisted on "make whole" relief for all individual victims of the discriminatory practices. But we have declined, on both legal and moral grounds, to use race or sex-conscious techniques (quotas, goals, set-asides, etc.) that assign to non-victims of the employer's discrimination a preference based on race, sex or national origin.

Once liability has been established, the Justice Department seeks the remedies of backpay, retroactive seniority, reinstatement, and hiring and promotion priorities, for all individual victims of the employer's discriminatory conduct in order to restore them to their 'rightful place' -- that is, to the position they would have attained but for the discrimination.

Moreover, the offending employers under our decrees are required to make special, affirmative efforts to recruit minority and female workers from those communities that had been ignored in the past, and to file periodic reports on their recruitment efforts. Such relief is, as it must be, tailored to fit the violation, since in virtually every instance of unlawful employment discrimination, the employer's search for new employees has been confined -- geographically and otherwise -- in a manner that reaches few minority and female applicants. Such comprehensive outreach programs are designed to break that stranglehold, and force employers to make known to the entire relevant labor market that employment opportunities are available to all qualified persons.

Our experience has been that a vigorous recruitment effort, combined with a full "rightful place" relief package for identifiable discriminatees, can and does fully eradicate the effects -- all the effects -- of prior discrimination. And it does so without trampling the legal rights of innocent employees. Moreover, this sort of relief produces lasting results. Instead of simply substituting one racially discriminatory employment policy for another, as the "quick fix" quota does, the relief package in our decrees acts to break down -- for all time -- the barriers which have traditionally excluded blacks, other minorities, and women from the workforce. This relief works, it works well, and it works without the stigmatization, unfairness and polarization inherent in a system built on preferential treatment tied to race or sex.

The position we have been advocating for some time receives strong support in the decision of the Supreme Court in *Firefighters Local Union No. 1784* v. *Stotts*, 104 S. Ct. 2576, June 12, 1984. The Court there delineated the scope of remedial authority granted to federal courts in Section 706(g) of Title VII, agreeing with our legal position that Congress intended "to provide make-whole relief only to those who have been actual victims of illegal discrimination." 104 S. Ct. at 2589. Moreover, the Court cited with approval the contemporaneous interpretation of the principal architects of the Act that "Title VII does not permit the ordering of racial quotas in businesses or unions." 104 S. Ct. at 2589 quoting 110 Cong. Rec. 6566. As we read the *Stotts* opinion, it appears to us to say that the federal courts may neither require nor permit race-conscious or gender-conscious hiring, promotion or layoff procedures as an element of Title VII relief (whether incorporated in a court order or a consent decree) in an employment discrimination case.

Once this decision was handed down, in keeping with our enforcement responsibilities under Title VII of the Civil Rights Act of 1964, we undertook a comprehensive review of all of our consent decrees to determine whether they contained any goals or quotas affording preferential treatment on the basis of race or sex to individuals who were not victims of discrimination. Our intention has not been to "open old wounds," and we do not plan to challenge any employment decisions already made under an outstanding decree. Rather, our interest is confined to determining whether the decrees have a continuing, on-going effect such that a prospective application of a quota provision would result in future discriminatory hiring or promotion practices. In those cases where such provisions existed, we contacted all parties to the decrees asking them to join us in a motion for modification to make the decrees conform legally to the Supreme Court's ruling in Stotts. We wrote letters in more than fifty cases seeking defendants' cooperation in modifying decrees. (While respecting the need for confidentiality of some of the correspondence, I was able previously to furnish the Subcommittee with all but one of those letters and most of the resulting reply letters.) We have filed motions in three cities seeking to modify decrees in accord with the Stotts decision. In two of these cities -- Buffalo and Chicago -- we did so in response to motions filed by other parties in ongoing litigation. We have also filed briefs, as a party or as amicus, in ongoing appellate cases in three courts of appeals.

As I am sure you are aware, in the year since the decision in Stotts, there have been four appellate decisions in which the courts of appeals have disagreed to one degree or another with our interpretation of the decision in Stotts. In light of these adverse rulings, it is abundantly clear that further clarification by the Supreme Court is needed. We are hopeful that, with the Sixth Circuit decision in Wygant v. Jackson Board of Education that will be argued in the Supreme Court next Term, and the opportunity for the Court to consider possible plenary review in the four appellate decisions, that clarification will be forthcoming in the near future.

In conclusion, let me to put to rest two allegations that have been made against our program to seek compliance with the decision of the Supreme Court in Stotts. First, we have not asked and will not ask district courts to depart from the governing precedent in their circuits. On the contrary, in the Buffalo litigation after learning of a Second Circuit decision interpreting Stotts narrowly, we advised the district court that we believed that the appellate decision was controlling precedent, although we disagreed with it. And in United States v. City of Miami, we similarly advised the district court that the Eleventh Circuit's interpretation of Stotts controlled the motion for modification filed by the Firefighters Local there. So long as such appeals court precedents remain in effect, we will consider them binding on the district courts in that circuit and will therefore not file unilateral motions in those courts seeking to modify decrees on the basis of Stotts.

Second, since there now appear to be several possible vehicles for Supreme Court review, the need to file many additional motions is diminished. While we may proceed to modify decrees where all of the parties are in agreement, or may be obliged in light of particular circumstances and our understanding of the law to advise a district court of the need for a decree modification in order to resolve an ongoing employment dispute, we have no plans to initiate lawsuits against state or local governments where such a course of action can be avoided.

If the Committee has any questions, I will be happy to respond to them.

Department of Justice

Testimony of William Bradford Reynolds
Assistant Attorney General
Civil Rights Division

before

the

Subcommittee on Employment Opportunities
Committee on Education and Labor
House of Representatives

on

Affirmative Action and Equal Employment Opportunity Enforcement
September 23, 1981

Mr. Chairman and members of the Subcommittee, I am pleased to be afforded this opportunity to discuss with you my views and the views of this Administration on the important issues relating to how inequities that occur in the area of employment should be addressed and corrected. I also welcome the opportunity to hear the questions and views of the members.

This appearance is my first before a legislative body since I assumed office on July 27 of this year. It is fitting, it seems to me, that my initial appearance concerns the subject of equal employment opportunity, since the field of employment is one of the most important in the area of civil rights. If a person is denied employment because of race, national origin or sex, the consequences may well be so serious as to make other civil rights largely academic. For example, access to equality of housing opportunity has little practical significance if an individual is discriminated against in the job-market and cannot earn a wage to purchase decent housing. Similarly, a diploma becomes less valuable if it fails to open doors to positions for which the person was trained. So the issue we are addressing today -- equal employment opportunity -- is of paramount importance. I know that this Subcommittee, and particularly its distinguished Chairman, fully appreciate the significance of equal employment opportunity and has done extensive and significant work in this area.

Before turning to the specific subject of my remarks today, let me provide a framework by first outlining for you what I see as my job and my role. As the Assistant Attorney General for Civil Rights, I am a law enforcement official, sworn to uphold the Constitution and the laws of the United States. The role of the Civil Rights Division of the Department of Justice is to enforce in the courts all Federal civil rights laws which come within the Attorney General's enforcement responsibilities by act of Congress, and to perform such other duties in the field of civil rights as the Congress, the President and the Attorney General may assign. The general areas receiving attention by the Division include: housing, education, coordination of grant related civil rights requirements, public services, institutions and other public facilities, criminal civil rights violations and, of course, employment. Of course, under Title VII, EEOC brings suits against private employers.

My testimony today has two principal themes. First, I want to underscore the fact that this Administration intends to pursue a vigorous policy of full and effective enforcement of the equal employment opportunity laws. On this point, it is worth taking a few moments to describe what the Civil Rights Division has been doing recently in this particular area. Second, I want to explain and discuss with you our policy with regard to corrective or affirmative action to overcome the effect of past discriminatory practices.

I. Record of the Civil Rights Division in 1981 in the Field of Equal Employment Opportunity

Both the President and the Attorney General have spoken repeatedly on this Administration's intent and determination to enforce vigorously the laws prohibiting discrimination, and particularly laws prohibiting discriminatory employment practices. I share that intent and that determination.

Let me give some specifics to show what the Civil Rights Division has been doing to enforce the laws. I have been in office for less than two months, so much of what I describe here took place before my assumption of authority.

1) The Division has filed several new pattern and practice suits alleging discriminatory practices based upon race, national origin and sex discrimination. Although I have been in office for but a short time, I have authorized full pattern and practice investigations into the employment practices of more than a dozen public employers. Just last week we filed a complaint and obtained a consent decree in a suit alleging sexually discriminatory practices in the New Hampshire state police force.

2) In contested litigation, the Division had a successful trial in February in a suit against the North Carolina State Police Department on the limited issue of the discrim-

inatory use of minimum height requirement, with the judge ruling favorably from the bench. In *United States* v. *County of Fairfax*, a trial in March resulted in a ruling of discriminatory practices against blacks and women by the County in the job categories involving the largest numbers of county employees. We are now in the elaborate and difficult "Stage II" of litigation, where individual claimants may be shown to be victims of past discriminatory practices, and thus may establish their entitlement to back pay and priority in offers of employment and promotion.

In August we tried a suit alleging that certain employment practices utlilized by the Texas Department of Highways and Public Transportation -- one of the largest agencies of the State of Texas-- discriminated against blacks, hispanics, and women.

3) The Department has filed important *amicus* briefs with the Supreme Court in a number of cases, including *Gunther* v. *State of Washington* (involving the construction of Title VII as it concerns sexually discriminatory pay practices.)

Given the inevitable delays of a transition, I suggest that this record is one of accomplishment. I believe it is evidence of this Administration's commitment to vigorous enforcement of Federal equal employment opportunity laws.

II Administration Policy Toward Mandatory Quotas, and Relief Designed to Correct for the Effects of Past Discrimination

Let me now direct my attention to the new Justice Department approach in fashioning appropriate relief to correct the effects of past discrimination.

The focus of today's hearings is on affirmative action and enforcement of equal employment opportunity laws. It should probably be noted at the outset that the phrase "affirmative action" means different things to different people, ranging from simple diligence in ensuring against discrimination to conscious favoritism of persons of one race or sex. To avoid confusion, I will try here to describe our position using neutral terminology that stays away from convenient "coined phrases."

The approach henceforth of the Department of Justice in the employment area in suits brought to enforce Title VII and similar statutues can be simply stated. We no longer will insist upon or in any respect support the use of quotas or any other numerical or statistical formulae designed to provide to non-victims of discrimination preferential treatment based on race, sex, national origin or religion. To pursue any other course is, in our view, unsound as a matter of law and unwise as a matter of policy. Race-conscious or sex-conscious preferences are, as history has shown, divisive techniques which go well beyond the remedy that is necessary to redress, in full measure, those injured by a particular employer's discriminatory practices. A brief backward glance through the tragic history of our experiences with racial distinctions in American life and the different government responses -- both legislative and judicial -- that have been given, will help to explain.

From the birth of this Nation, racial discrimination has stained the fabric of American law. The Declaration of Independence proclaimed the principle that all men are created equal, yet omitted any denuciation of slavery or the international slave trade. The Constitution of the United States, when originally ratified, accorded to black slaves a fractional status beneath that of free persons for purposes of apportioning representatives and taxes among the several states, and no rights to freedom, or the vote - or indeed any constitutional rights. Until 1808 the Constitution authorized the importation of slaves, and directed "free" states to return fugitive slaves.

No lesser authority than the United States Supreme Court added its weight to the then prevailing attitude by holding in the infamous Dred Scott decision not only that the Constitution does not endow black Americans with citizenship, but that Congress lacks power to prohibit slavery in United States' territories. That decision, together with a growing awareness of the inherent inequities embedded in the institution of slavery, ultimately led this country into Civil War, which, in turn, led to ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments. The compromises that ended Reconstruction, however, effectively ended federal inquiry into matters of civil rights, and discrimination survived the Civil War Amendments.

The Supreme Court again contributed to this setback in fashioning the "separate but equal" doctrine in Plessy v. Ferguson, 163 U.S. 537 (1896). Only Justice Harlan, in a powerful dissent, sounded the note that was later to become the battlecry of civil rights groups across the land. In eloquent style, he insisted that the Constitution is colorblind and permits neither legislatures nor judicial tribunals to "have regard to the race of citizens when the Civil Rights of those citizens are involved." It was awhile, however, before this principle began to take hold. Under the "separate but equal" doctrine, opportunities were virtually always separate, but rarely equal. Discrimination based on race, color or ethnic origin continued to be tolerated by the courts, not only against blacks, but also against persons of Chinese or Mexican origin,[1/] and, during World War

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1/ Gong Lum v. Rice, 275 U.S. 78 (1927) (Discrimination in public schools against persons of Chinese ancestry was permitted.).

II, against citizens of Japanese ancestry.[2/] And of course, women were relegated to second class citizenship until suffrage was obtained and were generally treated separately and unequally in employment thereafter.

It was only after years of litigation in the courts that the Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), finally overruled *Plessy* v. *Ferguson* and, following Justice Harlan's lead in dissent in the earlier case, held that the equal protection clause of the Fourteenth Amendment prohibits purposeful racial discrimination in all aspects of public facilities and functions. The *Brown* decision spurred an unprecedented judicial and legislative quest to purge racial discrimination, both public and private, from American life. Significant mileposts along the way included the 1957 Civil Rights Act, the 1960 Civil Rights Act, the 1964 Civil Rights Act, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.

In the area of employment discrimination, Title VII of the 1964 Civil Rights Act prohibited discrimination "against any individual with respect to his compensation terms, conditions, or privileges of employment, because of

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2/ *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Korematsu* v. *United States*, 323 U.S. 214 (1914) (Executive Orders discriminating against citizens of Japanese ancestry on account of unsubstantiated suspicion of potential disloyalty during World War II upheld).

such individual's race, color, religion, sex, or national origin...." (42 U.S.C. §2000 e-2(a(1)). That Title VII mandated nondiscrimination in employment decisions was made clear not only in the Act's language, but also in the legislative debates preceding its passage. For instance, Senator Hubert Humphrey, a leading advocate of racial equality and a foremost proponent of the 1964 Civil Rights Act, unequivocally rejected the suggestion that Title VII was intended to countenance race-conscious preferences. His words are worth restating:

> "It is claimed that the bill would require racial quotas for all hiring, when in fact it provides that race should not be used for making personnel decisions." 110 Cong. Rec. 6553 (1964).

In like manner, remarks by other proponents of the legislation endorsed the view that Title VII established a principle of "color-blindness in employment" Id. at 6564.

The basic outlines of the law are well developed and relatively clear. Title VII not only prohibits purposeful discrimination based upon race, sex, religion and national origin, but also prohibits employment practices which have a discriminatory effect, unless those practices are predictive of successful job performance or otherwise required by business necessity. A unanimous Supreme Court so ruled in

1971 in a decision by Chief Justice Burger[3] and the Congress accepted that interpretation when it amended and extended Title VII in 1972 through the Equal Employment Opportunity Act of 1972,[4] and when in 1972 and 1976 it adopted the Revenue Sharing Act and amended it and the Safe Streets Act.

Where such provisions of Federal law have been violated, the courts have the power and duty not merely to eliminate future discriminatory practices but also to correct the effects of past practices.[5] And the Supreme Court has made clear in McDonald v. Santa Fe Trails Transportation Co., 427 U.S. 273 (1976), that this statutory prohibition against racial discrimination applies to protect white employees with the same force as it protects black employees.

During the late 1960's and into the 1970's minorities and women made significant strides in the field of employment with the assistance of such statutory and decisional law outlawing discrimination on grounds of race, sex and national origin.

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[3] Griggs v. Duke Power Co., 401 U.S. 424.

[4] Pub. Law 92-261, March 24, 1972.

[5] Albemarle Paper Co v. Moody, 422 U.S. 405 (1975).

Relief for individual victims, however, began to be expanded into class-oriented relief, fostering the use of new hiring requirements designed to achieve immediate numerical equality among the races in the work place. Racial formulas, most notably in the form of hiring quotas, emerged under the byword of "affirmative action." This new concept went well beyond the traditional view that a racial or sex preference is permissible *only* when necessary to place an individual victim of proven discriminatory conduct in a position he or she would have attained but for the discrimination.[6] In addition, "affirmative action" became associated with the endorsement of such preferential treatment to aid persons who were not identifiable victims.

The proponents of this view sought the granting of preferences, not simply to individuals who had in fact been injured, but to an entire group of individuals, based only on their race or sex. It mattered not that those who benefitted had never been wronged, or that the preferential treatment afforded to them was at the expense of other employees who were themselves innocent of any discrimination or other wrongdoing.

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[6] See, e.g., *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *Franks* v. *Bowman Transportation Company*, 424 U.S. 747 (1976).

By elevating the rights of groups over the rights of individuals, racial preferences such as I have just described are at war with the American ideal of equal opportunity for each person to achieve whatever his or her industry and talents warrant. This kind of "affirmative action" needlessly creates a caste system in which an individual is unfairly disadvantaged for each person who is preferred. A divisive influence is inevitably introduced into the workplace, the community, and the country as a whole.

Nor is there any moral justification for such an approach. Separate treatment of people in the field of employment, based on nothing more than personal characteristics of race or gender, is as offensive to standards of human decency today as it was some 84 years ago when countenanced under Plessy v. Ferguson, supra. I can make the point no better than Professor Alexander Bickel did in his eloquent remark:

> "The lesson of the great decisions of the Supreme Court and the lessons of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."[7]

The Attorney General was no less articulate in his speech of May 22, 1981, before the American Law Institute in Philadelphia (pp. 12-13), when he stated:

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[7] A. Bickel, The Morality of Consent, 133 (1975).

> "While well intended, quotas invariably have the practical effect of placing inflexible restraints on the opportunities afforded one race in an effort to remedy past discrimination against another. They stigmatize the beneficiaries. Worst of all, under a quota system, today's minimum may become tomorrow's maximum."

This Administration is firmly committed to the view that the Constitution and laws of the United States protect the rights of every person -- whether black or white, male or female -- to pursue his or her goals in an environment of racial and sexual neutrality. The color-blind ideal of equal opportunity for all that guided the framers of the Constitution and the drafters of Title VII holds the greatest promise of lifting the incubus of race, national origin and sex discrimination from the Nation, and of realizing the proclamation of equality in the Declaration of Independence.

By embracing the principle of equal opportunity without preference in the field of public and private employment, the Justice Department in no way intends to relax its commitment to remedy proven discrimination. Fidelity to the ideal of equality demands that no individual be disadvantageously circumstanced in the workplace because of unlawful discriminatory practices. The Department is firm in its resolve to seek, in suits under Title VII and similar statutes, affirmative remedies such as backpay, retroactive seniority, reinstatement, and hiring and promotional priorities, to ensure that any individual suffering employment discrimination on account of race or sex be placed in the position that he or she would have attained in the absence of such discrimination.

In some circumstances, the granting of such relief will serve to advance individual victims into seniority positions, or onto career ladders, in preference to incumbent white or male employees shown to have been improperly favored. Similarly, appropriate relief should and will be sought for those qualified individuals shown to have been discouraged from seeking positions because of past practices of unlawful discrimination on the part of the employer. Make no mistake about it: the Department of Justice will be unyielding in its enforcement efforts to deter and remedy completely identifiable injuries attributable to discrimination in the workplace.

In addition to seeking full redress for individual victims, the Department will continue to seek injunctive relief directing the employer to make employment decisions on a nondiscriminatory race-neutral and sex-neutral basis. To ensure that the injunction is followed, we will require as part of the remedy that the employer make special efforts to reach minority or female workers through comprehensive use of employment recruitment techniques, such as media advertising and visiting high school and college campuses. In connection with this enhanced recruitment of minorities or women, the Department will insist that the employer periodically file records of its recruitment efforts.

Where appropriate, we will seek percentage recruitment goals for monitoring purposes. Such recruitment goals will serve as a triggering mechanism for Department inquiry into whether the employer has complied with the injunctive command to end its discriminatory practices. These recruitment goals will be related to the percentage of minority or female applicants that might be expected to result under a nondiscriminatory employment policy, after job related factors, such as age, education, and work experience among various applicants are taken into account. When combined with fair and nondiscriminatory selection procedures, they should be sufficient to correct the effects of past discriminatory practices.

Because there may be legitimate, nondiscriminatory reasons underlying an employer's failure to satisfy a particular goal, the Department will not treat recruitment goals as inflexible standards which must be met by the employer without regard to qualification. At the same time, we will be alert to guard against employers, in an overzealous attempt to satisfy recruitment goals, engaging in reverse discrimination. Were we to treat the matter in any other light we would be vulnerable to the charge that we have sought to meet discrimination with discrimination. This the Department will not do.

In sum, our approach will emphasize a three-pronged remedial formula consisting of (i) specific affirmative relief for identifiable victims of discrimination, (ii) increased recruitment efforts aimed at the group previously disadvantaged, and (iii) color-blind as well as sex-neutral nondiscriminatory future hiring and promotion practices. It is our view that such relief will effectively overcome the effects of past discrimination without prejudicing the legitimate interests of others in the work force.

CONCLUSION

I wish to emphasize to the members of the Subcommittee the Administration's commitment to enforce this nation's civil rights laws. In the employment area, we believe equality of opportunity can be achieved without resort to remedies which unfairly penalize those who are innocent of any discriminatory behavior.

Thank you. I will be glad to respond to any questions you may have.

Mr. EDWARDS. I do understand that you discussed the *Stotts* case in it, and I presume that you state what the Justice Department has done after the *Stotts* case, using what everybody that I know believes was rather a bizarre interpretation of the case.

I understand that you wrote to 51 public jurisdictions which use race- and gender-conscious goals and timetables to remedy employment discrimination and asked these jurisdictions—51 different cities, counties, states, and school districts—to join the Department in changing these remedies.

I might suggest, Mr. Reynolds, that your lawyers could have been put to better work with all the problems we have in civil rights in this country today. Spending all that time to write all these jurisdictions, trying to get them to change their minds, didn't help matters, especially since practically all of them wrote back to you and said, "Leave us alone. This is our business, and we're doing very well with these consent decrees. We're getting along with our employment practices and the agreements we have made."

For example, the Maryland attorney general, Stephen Sachs, wrote, "I disagree with Justice's interpretation of *Stotts*," and then he pledged to "vigorously oppose and resist any effort by the Justice Department to modify our decrees."

Macon, GA: "We are going to fight any effort to change or modify the consent order."

Milwaukee: "The Stotts decision is not applicable" to their hiring practices.

Out of the whole bunch that we contacted—I wrote them and asked them how they were reacting to your interference—only two cities—Buffalo and Wichita Falls, TX—indicated that they might cooperate with you.

The Department had already gone to court in Buffalo, and the court there squarely rejected your interpretation that *Stotts* outlawed the use of race- or gender-conscious remedies. Judge John Curtin wrote: "I would only add that the differences between *Stotts* and the cases pending here are so great that there should be no serious question concerning the impact of *Stotts*."

Other courts, too—you've got five circuits of appeal—have disagreed with your interpretation of *Stotts*. These courts have all said that *Stotts* does not outlaw the use of race- or gender-conscious remedies.

As a matter of fact—and I hope you would enlighten us, Mr. Reynolds—there's not one single court that has adopted your interpretation.

Well, we are glad to have you. We've had you before us a number of times before, Mr. Reynolds, and I will yield to the chairman of the Subcommittee on Employment Opportunities for questions, Mr. Martinez.

Mr. MARTINEZ. We are new to each other, and we are about to get acquainted.

I'm going to refer to your written testimony. You mention in your testimony that, "Relief must be tailored to the violation"—here again, in reference to the fact that only individual cases of discrimination are those that we should be concerned with—"but if an employer discriminates against all women and all minorities who apply for a job or who, in effect, are discouraged from applying for a job."

What is the appropriate measure of relief, especially to a company that has engaged in that practice, let's say, for 75 years?

Mr. **Reynolds**. Mr. Chairman, we have responsibility for the public sector in the employment discrimination area, and our authority allows us only to bring pattern and practice lawsuits, which means that the kind of situation you describe would be precisely the kind of activity that we would direct our attention to and have directed our attention to. In our employment cases where we have a pattern or practice of discrimination, the relief that we impose or we ask the court to impose—and the courts have for the last 4 years followed these requests—is obviously to have an injunction of the discriminatory behavior.

All the victims of the discrimination—and that would include those who could demonstrate that they were deterred from seeking employment by reason of knowledge of the discriminatory practices of the employer—all of those victims would be entitled to make-whole relief, which would include the full spectrum of backpay and seniority rights and a position in the work force that they were entitled to.

Then, affirmative action requirements in the nature of recruitment, outreach, and training programs that would seek out all of those individuals who are interested in qualifying for employment, bring them into the applicant pool, have them considered on an equal and even-handed basis with everyone else, and select those that are the most qualified for the job.

Mr. **Martinez**. It sounds as if what you are saying is that the use of goals and timetables to reach percentages, let's say, where there have been none at all or have been denied for a long period of time is applicable and is a good thing.

Mr. **Reynolds**. Well, the problem with a lot of the discussion in this area is that we use words that mean different things to different people.

I think that goals as yardsticks that do not contemplate preferential treatment on account of race or sex are certainly permissible, and we use them in our decrees, certainly in the recruitment area, to target what we would expect to be the results of a good faith recruitment program when you assess that against what the available workforce would be in the relevant labor market.

The only thing that we do say is necessary is that, when you look at availability, it has to take into account those who would be interested as well as qualified for the job.

Mr. **Martinez**. So, there would be reasons to look at percentages where there has been none in the past?

Mr. **Reynolds**. Well, as I say, again, I think as long as one does not look at percentages in a way that would tolerate any kind of preference by reason of race or sex, a percentage as a yardstick for someone to have in their mind is something that does not offend the law.

Mr. **Martinez**. Let's say more than race or sex, or national origin.

Mr. **Reynolds**. Certainly—or national origin.

Mr. MARTINEZ. In that consideration, and where there has been no minority in the work force and I understand that the court can impose numerical remedies. And in yesterday's hearing I heard it a couple of times that minorities were not even present in the work—that to set a number or percentage—and you're indicating here that it's OK where it doesn't create reverse discrimination.

I don't know how anybody can be concerned if there have been no minority workers in the past and now we are making an effort, and if by court decree, or if by just guidelines and regulations, to try to reverse a situation that has existed for a long period of time, how is it that we're in any way creating any kind of reverse discrimination or detriment to those others that are not of that minority group? I just don't understand that. If you can explain that to me, I'd appreciate it.

Mr. REYNOLDS. I'm not sure I fully understood your question. If I did, as I understand it, you are asking how we can decline to suggest that there can be any kind of a preference for those who have not been participants in the workforce over a long period of time.

The answer is that—and I think it's very clear—you have to put in place affirmative steps designed to open up opportunities for those who have been denied them and to bring into the workforce as many individuals as you can who are minorities or people of national origin that have been denied those opportunities.

What I don't think you can do is discriminate. We've got laws in this country that say very definitely you cannot discriminate. My view is, to the extent that you put in place any kind of a program that tolerates discrimination on account of race or sex or national origin, you run afoul of those laws.

So I would agree with you that you can use affirmative action techniques that do indeed recognize, for example, some kind of a goal over the long haul, but you can't put in anything of that sort if it is discriminatory by reason of immutable characteristics, and I think our laws are pretty clear on that.

Mr. MARTINEZ. I think our laws are very clear that we don't discriminate. Although the laws are that way now, in the past, there were whites that did exactly what you are suggesting that no one should do.

So if there is affirmative action now, and I think you have attested to the fact that we need affirmative action and that we need to work in the direction of allowing those who have not participated before to have the opportunity to participate. That doesn't necessarily have to be at the pain of those who have been participating all along.

Thank you.

Mr. EDWARDS. The gentleman from Wisconsin, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

I have had an opportunity to review your prepared statement which is about 9 or 10 pages long. It was delivered to my office at about 6 o'clock last night.

I note that during the first Reagan administration the Civil Rights Division filed 49 suits against employers alleging violations of equal employment opportunity laws, whereas during the Carter Administration only 41 suits were filed. So I think that in terms of numbers of suits as well as the significance of the suits, there certainly has been no slacking in the enforcement.

It seems that the primary argument is over goals, quotas, and timetables and whether Title VII actually does require that.

I have done some looking into the legislative history, and I think it's very clear that Title VII was only intended to give make-whole relief to actual victims of discrimination.

During the debate on Title VII, Senator Hubert Humphrey, who certainly was not a laggard in the area of civil rights, said,

> No court can require hiring reinstatements, admission to membership, or payment of backpay for anyone who was not fired, refused employment or advancement or admission to a union by act of discrimination forbidden by this title. There is nothing that will give any power to the commission or to any court to require firing of employees to meet a racial quota or to achieve a certain ratio balance. This bugaboo has been brought up a dozen times.

A memo by the Republican House sponsors which was quoted by the Court in the *Stotts* case says, "Title VII does not permit the ordering of racial quotas in businesses or unions."

Finally, a statement by the principal sponsors of Title VII,

> Under Title VII, not even the Court, much less the commission, could order racial quotas or the hiring, reinstatement, admission to membership, or payment of backpay for anyone who was not discriminated against in violation of this title.

Against this backdrop, how can Title VII in its legislative history be interpreted as giving the Court power to order anything but make-whole relief to actual victims of discrimination?

Mr. REYNOLDS. Congressman, I'm afraid that I don't know how it can, and my sense is that the Supreme Court, when asked that very question, answered it the same way, that if you read the legislative history and the language of Title VII, it does not tolerate the use of quotas, goals, or timetables, or any other preferential technique in fashioning relief in employment discrimination, that the statute was intended to and did, in fact, limit the authority of the courts in terms of the remedies available to enjoining the discrimination and to providing make-whole relief for actual victims of the discriminatory conduct, and then, of course, to proceed to use affirmative action techniques that do not discriminate against others or are not preferential by reason of race or sex.

That's the construct of the statute. It seems to me that's the very definite thrust of the Supreme Court's decision in *Stotts*, and, as you know, we have taken that stand, and those who have disagreed, as Chairman Edwards has indicated is the case with a number of jurisdictions, we have done what I think responsibly we should do, which is to go right back to the courts and get them to resolve the ambiguity.

If there is a failure of clarification in a Supreme Court decision, I can't think of a better way to get it clarified than to get the issue back into the court, up to the Supreme Court, and get the Supreme Court to clarify it, and that's precisely what we have done.

Mr. SENSENBRENNER. Much has been made of the 51 letters that you sent to jurisdictions that were under consent decrees that did provide for quotas or preferential hiring procedures.

I guess that your sending 51 letters is a waste of time but the subcommittee's sending the same 51 letters to the same people is a constructive debate on public policy. I'm somewhat puzzled as to how those statements are consistent, but, be that as it may, the area of civil rights has been an area of frequently shifting court decision. Sometimes the pendulum swings one way, sometimes the pendulum swings the other way.

When there is a court decision that appears to have changed the law or interpretation or executive branch procedures or litigation posture, has it been the policy of the Justice Department previously to try and conform consent decrees to what the law is as a result of a new court decision?

Mr. REYNOLDS. I think that it would consistently be the position of the Department of Justice that when the Supreme Court has spoken, we would have to ensure that our decrees are in line with what the Supreme Court has said.

We are not interested in going out and redoing or reshaping consent decrees that might not conform with some policy decision that we have made where we don't have a Supreme Court case directly on point.

I would in that regard, point to the whole string of decrees in the school desegregation cases that rely very heavily on mandatory busing as a form of remedy.

We did not come in and seek to change or modify those decrees. They are in place, and we don't see that there is anything in the Supreme Court decisions that say that's an impermissible remedy. We think, as a matter of policy, it's not a very constructive remedy, but we have not gone back and sought to change decrees in that regard.

We did not go back to seek to change any of the employment decrees for the first 3½ years of this Administration, even though we felt that the quota provisions were contrary to the policies and, indeed, in our view, the legal requirements of title VII.

Rather, we took the issue to court. We argued it up through the courts to the Supreme Court, waited for a Supreme Court decision, and at that point we went back and said you have to conform to what the law of the land is as announced by the Supreme Court, I think that's consistent with the Department of Justice's approach in this area throughout.

Mr. SENSENBRENNER. I guess in listening to the criticism that has been leveled against you personally and the position of the Justice Department as well as the answer that you gave to my previous question—I guess what I am hearing is that, when we agree with the Supreme Court decisions, we ought to jump through the hoop and immediately conform with what the Court decisions say; when we don't agree with the Supreme Court decisions, let's just ignore them and criticize people who do want to follow them.

Thank you.

Mr. EDWARDS. The gentlewoman from Colorado, Mrs. Schroeder.

Mrs. SCHROEDER. Thank you very much, Mr. Chairman, and thank you, Mr. Reynolds, for being here this morning.

I want to talk about white males a little bit. Could you tell me the evidence that you have come up with showing us that white males are truly being discriminated against?

Mr. REYNOLDS. I don't know that I have any general impression that they are. We operate on a case-by-case basis, and in those circumstances where there is a quota provision that suggests one for one hiring based on race or on gender, we think that's a discriminatory feature by definition, and whoever is left out of that is discriminated against.

But it's not always the white males. There are instances where, for example, in New Orleans, the Hispanic police officers were challenging the one-for-one quota because it was in favor of blacks only, and they didn't get the benefit of a quota provision.

Mrs. **Schroeder**. Have white males come to the Justice Department in groups saying this, that they really feel that the 14th amendment and Title VII are discriminating against them?

Mr. **Reynolds**. Individuals have come, and groups have come, in connection with particular cases, but that's true whether it's white males or white females or black males or black females or people of a particular national origin who are male or female.

Mrs. **Schroeder**. What I hear you saying, though, is that if you look at race, national origin, or gender consciousness in hiring, that discriminates against white males. We've seen that—right?

Does that mean white males get the first chance at the job and when all of them are hired we enforce the other part?

Mr. **Reynolds**. No, I don't think anybody gets a first chance at the job. I think what you do is, you recruit and make all the affirmative efforts you can to recruit from the entire relevant market, and then you assess who is to get the job based on individual talent and merit, and it's without regard to whether it's a white male or a black male or a white female or a black female or a Hispanic male or a Hispanic female and so on.

Mrs. **Schroeder**. Well, I always thought that's what it was about, except that you tried to have a work force that looked like the population, if possible. I think it's very clear, if you look at the history of the 13th and 14th amendments and Title VII, there was an attempt to bring people into the mainstream that had a long history of being discriminated against in the workplace. I think everybody agrees that doors were not opening in front of women, Hispanics, blacks, and certain people of other national origin. So that was what it was all about.

Yet I hear you saying we can't engage in those procedures because it goes against white males.

Mr. **Reynolds**. No. It goes against the law of nondiscrimination. All I'm saying is that the process that you use—the selection process you use—has to be nondiscriminatory. It can't favor one or disfavor another by reason of race or sex or national origin. That's what I'm saying.

Whoever the beneficiary is of that policy is going to get ahead by reason of his individual or her individual talent and worth.

Mrs. **Schroeder**. Don't you have to be really dumb as an employer to say to someone, "I'm not going to hire you because you're a woman," or, "because you're black"?

There are thousands of people qualified for lots of different jobs. If you won't look beyond an absolute, blatant, stupid statement of somebody who hasn't read the newspaper since 1964, and they just say, "I'm not going to hire you because you're a woman," or, "I'm not going to hire you because you're black, or Hispanic," or something else, how do you ever break that down?

I mean, how do you ever realize that they are making some kind of an effort to break down their own problems that they have psychologically with bringing women or men of other colors or national origins into the work force? How do you know whether or not they are really discriminating?

Overt discrimination is easy, it's real easy, but there are not many people left in America that do it overtly because they have caught on. To do it in a more covert way is a real challenge, and you don't seem to be worried about that.

Mr. Reynolds. Certainly there is discrimination in a covert way, and we do go after that, and I think we have been very effective both in terms of our record of suits brought and the relief we have gotten in breaking down covert discrimination.

I also think that, by the same token, there is probably nothing more overt in terms of discrimination than a quota system, and I think that, just as you are suggesting that an overt discriminatory policy is something that is offensive if it operates in one direction, my view is that the law says it's equally contemptible if it operates in another direction.

Mrs. Schroeder. I tend to disagree with you, because I think everybody is looking at the quota system not as an absolute, mandated, "You must have 3.7 males for so many females", but they are talking about the fact that that is one of the things you look at to see whether or not an employer is making a good faith effort.

If I may switch my hat to the chairwoman of the Civil Service Subcommittee, when you first took office, I know you wrote to all the different civil service agencies and told them that you were not going to comply with the Garcia amendment which asked for outreach in the Federal Government in employment. So I guess the implication was, they probably didn't have to either, if the main law enforcement officer of the United States Government was saying he wasn't going to do that. Is that still your position?

Mr. Reynolds. That was never our position. We do indeed comply with the Garcia amendment and have an outreach program in hiring, and the Department of Justice has been way out in front of most of the other agencies in terms of minorities and women who have been brought into the work force.

The only thing we resisted with regard to the EEOC reporting requirements was reporting to the EEOC about those hiring practices prospectively by locking ourselves into———

Mrs. Schroeder. Did you ever report?

Mr. Reynolds. Sure. We have reported every year, but what we haven't done is locked ourselves into any fixed numerical formula that would suggest that, over the years, the next year we are going to somehow target or hit a particular number.

Mrs. Schroeder. My time is up, but I must say then, you are really in violation of the Garcia amendment, which makes it very clear.

Mr. Edwards. The gentleman from Ohio, Mr. DeWine.

Mr. DeWine. Thank you, Mr. Chairman.

Thank you, Mr. Reynolds, again, for joining us this morning.

Recently, the U.S. Commission on Civil Rights published a document entitled "Toward An Understanding Of Stotts," in which Commissioner Mary Frances Berry stated, "Civil rights laws were not passed to give civil rights protections to all Americans, as the majority of this commission seems to believe." Could you comment on that statement?

Mr. **Reynolds**. I have a fundamental disagreement with Ms. Berry with regard to that. I think that the civil rights laws were very definitely passed to benefit all Americans and apply equally to all Americans, and indeed the major part of the debate with regard to the 1964 civil rights laws, it seems to me, was centered on exactly whether it was supposed to be legislation that was preferential as to a particular group or whether it was legislation that was to be applied even-handedly across the board for all Americans.

The Federal law that was passed was one that very definitely was designed to give the civil rights protections to every American in this country without regard to race, sex, national origin, religion, and so on.

Mr. **DeWine**. And what do you base that interpretation on?

Mr. **Reynolds**. Certainly the statutory language itself confirms that clearly. The legislative debates and the legislative history—we have already heard Congressman Sensenbrenner read a quote from Senator Hubert Humphrey who was a key sponsor.

The decision of the Supreme Court in *Stotts* went through a fairly lengthy analysis of the title VII legislative history. The Supreme Court has done the same in other cases, and I think that it's really quite clear that the laws that were passed by Congress were not ones designed to prefer or favor or disadvantage or disfavor individuals but to treat everybody similarly and ensure that the civil rights of every individual were protected.

Mr. **DeWine**. You have indicated and there have been comments made by members of the committee about some of the courts disagreeing with the department's interpretation of *Stotts*. Could you just briefly tell us what level those cases are and when you can expect some sort of resolution of this?

Mr. **Reynolds**. I believe that there are four court of appeals cases. Chairman Edwards had indicated there were five. I think there are four, but I could be off by one.

I think there are courts of appeals that have dealt with the *Stotts* issue and have interpreted the decision in different ways but generally more narrow than we have suggested. Those courts of appeals decisions are—I believe in three of them a petition for certiorari has been filed with the Supreme Court and the Court will have to act on those petitions when it reconvenes in October. The fourth one in the First Circuit came down just recently, and that's a case I also understand is likely to have a petition filed in the Court.

So I think that all four of the appellate court cases will be before the Court in petition form for it to consider, perhaps taking this issue again and seeking to clarify whatever ambiguities were created by *Stotts*.

Mr. **DeWine**. Thank you, Mr. Reynolds.

Thank you, Mr. Chairman.

Mr. **Edwards**. The very distinguished chairman of the full committee and I apologize I didn't call on him first, Mr. Hawkins.

Mr. **Hawkins**. I was busy on some assignment where you were supposed to be present also.

Thank you, Mr. Chairman.

Mr. Reynolds, I was very delighted to know, quite recently, that before the National Association for the Advancement of Colored People, the Secretary of Labor, Mr. William Brock, did make a very strong statement in which he said affirmative action was a part of, by implication, the administration's policy.

Yet you seem to be speaking for the administration today, I ask you, which one of you is speaking for the policy of affirmative action on behalf of this administration.

Mr. REYNOLDS. I think we both are. I don't have any disagreement with Secretary Brock. We both believe very strongly that affirmative action measures are essential and should be used as part of the equal employment policies. This administration has endorsed them continually. We have them as a feature of our consent decrees, and I don't think there is any difference at all between Secretary Brock and myself regarding the need to use affirmative outreach, recruitment, and training programs as a feature of employment.

Mr. HAWKINS. You construe his statement, then, to be in line with your statement—that the impression that he left with the NAACP is the same as the impression that you are leaving with this committee—that there's no difference?

Mr. REYNOLDS. I cannot speak to what impressions others have by reason of the statements. I can say that I am confident that Secretary Brock and I are not in disagreement, that the administration policy is well set and has been well set, and that we both agree wholeheartedly that affirmative action measures are a central and integral part of the equal employment policy.

Mr. HAWKINS. Then I assume we are not making a distinction—that Mr. Brock was speaking just as you are speaking today—is that so?

Mr. REYNOLDS. As I say, I don't think there's a disagreement with what we have said.

Mr. HAWKINS. On page 6 of your statement, you say, "I am no newcomer to the debate over quota relief, sometimes described as affirmative action." You seem to equate those two ideas as being overlapping or having the same definition. Is that, in effect, your definition of affirmative action?

Mr. REYNOLDS. No, that wouldn't be my definition. I think that's one of the problems with the discussion in this whole area, that we use terms that are not well defined, and affirmative action takes on a number of different definitions, depending on who is using it. I think that probably is one of the causes for confusion or questioning with regard to Secretary Brock's statement and my statement and other people in the administration.

Mr. HAWKINS. Would you define then what you mean by affirmative action, and does it exclude quota relief?

Mr. REYNOLDS. Affirmative action, as it was traditionally understood when it first was applied in the civil rights area, was affirmative outreach, training, and recruitment programs of a nondiscriminatory nature that did not favor or disfavor individuals by reason of their race, sex, or national origin.

Mr. **Hawkins**. Is that the way it is defined by the courts? If so, which court defined it in the manner in which you have just described?

Mr. **Reynolds**. I think that the courts have probably defined it as many ways as there are court decisions. That's one of the problems in this area. The term has been loosely applied to any number of different features of a remedy package.

There are some that certainly have applied it to say that affirmative action is quota relief. There are others that have talked about it in terms of goals and timetables relief. I think that the Supreme Court in *Stotts* talked about affirmative action in terms of recruitment and outreach programs of a nondiscriminatory nature.

Mr. **Hawkins**. I don't think that any of the courts has defined it differently or has created the confusion that you seem to be creating at this particular time. You speak constantly throughout your prepared statement of recruitment and outreach programs, and you just repeated that again in terms of affirmative action.

Does it also include employment? In other words, you are ready to say that you should have affirmative measures. Now, that's used as an adjective, it isn't used as a concept. In affirmative measures, such as recruitment and outreach programs, do you also include hiring, promotion or any of the other conditions of employment as well as recruitment?

Mr. **Reynolds**. I think that affirmative action programs can include affirmative steps that would help in the promotion area that relate to certain training programs, for example.

Mr. **Hawkins**. You again say that, "We have declined to use race- or sex-conscious techniques, quotas, goals, set-asides, et cetera." Do you then reject set-asides as being a part of affirmative action, or do you support set-asides?

Mr. **Reynolds**. I think a racial set-aside that reserves certain positions for people simply by reason of their race, sex, or national origin are impermissible, if you are talking about that kind of set-aside.

Mr. **Hawkins**. Are you then opposed to the *Fullilove* decision with respect to the set-asides that we have used in conjunction with employment in public works programs? Have you opposed that decision in terms of rejecting set-asides based on a race set-aside which was supported and approved by the Supreme Court?

Mr. **Reynolds**. The Supreme Court decision is one I'm well aware of. I think that the program there that Congress put in place is one that was designed to ensure that those individuals who benefited by that set-aside could demonstrate that they indeed had been discriminated against and part of the legislative construct included an administrative hearing that would ensure that those who did benefit were those that had been victimized by discriminatory activity. I think that certainly is the proper way to identify those people who should be the beneficiaries of a program of that sort.

Mr. **Hawkins**. The question is, do you favor set-asides as it is included in the Public Works Act which did provide for a certain number of individuals of a particular race to benefit from it, as interpreted by *Fullilove*? It seems to me that you can answer yes or no without trying to reinterpret what the Supreme Court said. Do you support that particular decision?

Mr. Reynolds. Well, certainly we enforce those decisions and would enforce it. Congress put that program in place. It's no longer a continuing program, but at the time that it was a viable program, it was one that certainly was supportable and would be supported in light of the Supreme Court decision.

Mr. Hawkins. Why have you said that, "We have declined"—and I'm quoting your language—"We have declined on both legal and moral grounds to use race- or sex-conscious techniques, quotas, goals, set-asides"?

Mr. Reynolds. We have declined to use that; that's right.

Mr. Hawkins. And now you say you will enforce it.

Mr. Reynolds. As I say, if called upon to enforce *Fullilove*, the beneficiaries of that set-aside would be those who could demonstrate that they had been victims of the discriminatory activity that Congress was concerned about, and that, to me, is no different than make-whole relief for those who are victims of discrimination.

I believe that is eminently fair and proper, and I have no difficulty with the congressional construct that was devised in that particular situation to allow for the victims to become the beneficiaries of those contract programs.

Mr. Hawkins. In the *Weber* case, where a specific numerical goal was established, 50 percent black, 50 percent white; in the *Fullilove* case, which was a specific set-aside based on a race-conscious basis; in *Griggs*, which had a specific race-conscious remedy as well; and even in *Bakke*, where the courts indicated that race-consciousness could be considered—in all of these cases, which were decided prior to the recent *Stotts* case, I assume you disagree with those decisions and that you do not seek to give judicial credence to those decisions prior to *Stotts?*

Mr. Reynolds. No, no. We follow Supreme Court decisions as long as they are on the books.

I see no inconsistency with any of those decisions and the *Stotts* decision.

Mr. Hawkins. You see no inconsistency between your objection to a race-conscious remedy, which you state openly as your legal interpretation of the state of the law and these decisions which upheld race-conscious remedy? You see no inconsistency?

Mr. Reynolds. No. I think they are all distinguishable from *Stotts* and readily distinguishable, and I don't see that the *Stotts* decision sought to overturn or even to treat with the issue that was directly presented in those cases.

Mr. Hawkins. How can you be advocating a color-blind approach and refusing to defend a race-conscious remedy, as you are doing this morning? You see no inconsistency in that position and all of these cases that I have mentioned and many others that I have not mentioned? You see no inconsistency at all?

Mr. Reynolds. *Stotts* spoke to the authority of a court in a title VII case under title VII, which is the employment discrimination statute, and it said that the way Congress drew the statute, it did not authorize courts to use the quota relief or goal and timetable relief designed to favor some and disfavor others simply on the basis of race, sex, or national origin, and that particular ruling interpreting that statute, which defined the authority of the courts to remedy violations of that statute, is something that I think does not implicate any of the other decisions that you have mentioned to me.

Mr. HAWKINS. The point is that you were opposing affirmative action a long time before *Stotts*. *Stotts* is actually irrelevant to your philosophy and your concept of civil rights. So you cannot use *Stotts* as the basis upon which you have, since the early days, opposed affirmative action since *Stotts* was decided in June of last year. Consistently, since 1981, before these committees and elsewhere, you have been defending your position. So I don't think that you have any legal grounds on which to base it, other than a feeble one in *Stotts*.

Do you have any other decision to base it on? You are certainly not basing it on established constitutional amendments. You would say that the 13th, 14th, and 15th amendments, I guess, were passed in order to protect white males and that the Civil War was fought to free white males from slavery. That seems to be the only conclusion that we can reach.

I would say that the President talks about misfits. I think you are just in the wrong division, Mr. Reynolds. I think you belong somewhere else where your type of philosophy may apply, but it certainly does not apply in the field of civil rights. I don't think you've given us one single thread of evidence that you have any support for your views. You don't have any congressional or judicial support.

The Walker amendment, the Hatch amendments, which have sought to overturn affirmative action have been soundly rejected by the Congress. The courts have not upheld your position. So, other than a philosphy which seems to be strained and radical, I just don't think you have any support anywhere. You have not demonstrated any today, and if you have some, I wish you would cite it, other than the *Stotts* case, which I think is a very weak explanation.

Mr. REYNOLDS. I don't view *Stotts* as feeble as you do, obviously, Congressman, but I will be happy to submit to this committee, and ask that it be made part of the record the brief that the Government has just filed with the Supreme Court in the *Wygant* case, which I think more than amply and fully expounds on the legal basis for the positions and policies that we have been espousing for the last 4 years.

Mr. HAWKINS. I'll ask that that be made a part of the record.

Mr. REYNOLDS. Thank you.

Mr. HAWKINS. I think Mr. Reynolds should have something in the record to justify the position which he is advocating.

Mr. EDWARDS. It will be accepted as a part of the record.

Mr. HAWKINS. Thank you.

[The brief follows:]

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 23, 1985

Honorable Don Edwards
Chairman, Subcommittee on Civil
and Constitutional Rights
Committee on the Judiciary
U. S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

Pursuant to the request of Chairman Hawkins in the July 11 oversight hearing, we are sending a copy of the Department's brief filed in the Supreme Court as amicus curiae in Wygant v. Jackson Board of Education. The case presents the question whether the Equal Protection Clause of the Fourteenth Amendment permits a public entity to grant certain public employees preferential protection against layoffs solely on the basis of their race or national origin, when there is neither a finding nor even evidence that these (or any) employees have been discriminated against by that entity.

We respectfully request that the brief be made a part of the record for the hearings on affirmative action.

Sincerely,

Jack E. Perkins for
Phillip D. Brady
Acting Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs

No. 84-1340

In the Supreme Court of the United States

OCTOBER TERM, 1984

WENDY WYGANT, ET AL., PETITIONERS

v.

JACKSON BOARD OF EDUCATION, ETC., ET AL.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment permits a public entity to grant certain public employees preferential protection against layoffs solely on the basis of their race or national origin, when there is neither a finding nor even evidence that these (or any) employees have been discriminated against by that entity.

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INTEREST OF THE UNITED STATES

The government has the responsibility for enforcing numerous statutes prohibiting discrimination on account of race or national origin[1] and, accordingly, has frequently participated in this Court, both as a party and as *amicus curiae*, in cases presenting constitutional and statutory claims of racial discrimination.[2]

STATEMENT

Before the 1972-1973 school year, the collective bargaining agreement between the board of education and teachers association of Jackson, Michigan, called for layoffs on a strict seniority basis (Pet. App. 21a).[3] In 1972, however, the board signed a new pact requiring lay-offs on a racial and ethnic basis. Specifically, it agreed that "at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff" (*id.* at 3a, 23a). The goal of this system was "to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools" (*id.* at 13a, 22a, 32a). The agreement defined "minority group personnel" as those "who are Black, American Indian, Oriental, or of Spanish descendancy" (Pet. App. 1a).

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[1] See, *e.g.*, 42 U.S.C. 2000h-2; 42 U.S.C. 2000e-5(f)(1); and Exec. Order No. 12250, 45 Fed. Reg. 72995 (1980).

[2] *E.g.*, *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980); *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979); *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

Petitioners are Jackson teachers who were laid off in accordance with this provision while "minority" teachers with less seniority were retained. Petitioners brought suit in the United States District Court for the Eastern District of Michigan, claiming that the lay-offs violated the Equal Protection Clause; Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*; other federal civil rights statutes (42 U.S.C. 1981, 1983, and 1985); and various state laws. On cross-motions for summary judgment, the court dismissed all of petitioners' claims.

Addressing the teachers' Fourteenth Amendment claim, the court first held that a finding of discrimination was not a prerequisite for the racial and ethnic preferences granted by the collective bargaining agreement (Pet. App. 25a-27a). Instead, the court held (*id.* at 28a-31a) that the Equal Protection Clause was satisfied if (1) "'there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access [and promotion] of minorities'" and (2) the affirmative action plan meets a test of "reasonableness," *i.e.*, is "'substantially related' to the objectives of remedying past discrimination and correcting 'substantial' and 'chronic' underrepresentation" (*id.* at 28a, 31a, quoting *Detroit Police Officers' Association* v. *Young*, 608 F.2d 671, 694, 696 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981)).

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[3] A poll of the teachers revealed that 96% favored retention of this system and opposed a freeze offering special protection against layoffs to minority group members (Pet. App. 21a).

Applying this test, the court found "substantial and chronic underrepresentation" solely because the percentage of minority students exceeded the percentage of minority teachers (Pet. App. 29a). The court reasoned (*ibid.*) that "minority teachers are role-models for minority students." The court then held (*id.* at 31a-34a) that the lay-off quota met the test of "reasonableness" (*id.* at 31a).

The court ruled that petitioners' claims under 42 U.S.C. 1981, 1983, and 1985 failed because the lay-off provision was constitutional[4] (Pet. App. 34a-35a); that petitioners had not satisfied the administrative prerequisites for suit under Title VII[5] (Pet. App. 34a), and that dismissal of all the federal claims necessitated dismissal of the pendent state claims as well (*id.* at 36a).

The court of appeals affirmed (Pet. App. 2a-19a) in an opinion that adopted the district court's reasoning and extensively quoted from the district court's opinion (*id.* at 4a-10a).[6]

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[4] The court also held (Pet. App. 36a) that the claim under 42 U.S.C. 1985(3) was defective for failure to allege a conspiracy.

[5] Petitioners were barred from suing under Title VII because they had not filed administrative claims with the Equal Employment Opportunity Commission. 42 U.S.C. 2000e-5(f)(1). Petitioners did not appeal the district court's dismissal of their Title VII claims. Moreover, at the time of dismissal, the statute of limitations for filing administrative claims (42 U.S.C. 2000e-5(e)) had already run. Accordingly, petitioners are now relegated to those claims grounded upon the Fourteenth Amendment.

[6] Judge Wellford concurred, but expressed disagreement with the majority's view that underrepresentation of minorities could be established by comparing the proportion of minority teachers to minority students rather than to minority representation in the relevant labor market (Pet. App. 15a-19a). He believed, however, that petitioners, as plaintiffs below, bore the burden of proving "the

INTRODUCTION AND SUMMARY OF ARGUMENT

As amicus curiae in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the United States argued that the Fourteenth Amendment "established the broad constitutional principle of full and complete equality of all persons under the law, and that it forbade all legal distinctions based on race or color." [7] The schoolchildren and their parents and guardians took the same position, contending that "the Fourteenth Amendment prohibits a state from making racial distinctions in the exercise of governmental power." [8] We make the same argument in the present case.

In this case, petitioners were laid off from their jobs as school teachers for the sole reason that they are white and the respondent school board, a governmental agency subject to the Fourteenth Amendment, had bound itself in a collective bargaining agreement to an absolute layoff preference for "employees who are Black, American Indian, Oriental, or of Spanish descendancy" (Pet. App. 1a). There was no finding by the school board, the courts below, or anyone else, that members of some or all of these groups had been the victims of discrimination by the school board, by the City of Jackson, or by the State of Michigan. There was no inquiry into the reasons for whatever disparities existed between the representation of these groups in the teaching and the student bodies. All there is by way of justification for the racially based misfortune visited upon petitioners are references by the district court and the court of appeals to a history of "societal discrimination" (Pet. App. 4a, 25a), "underrepresentation" of minority teachers (*id.* at 6a-9a, 28a-31a), and the need to supply "role-models"

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percentage of qualified minority teachers in the relevant labor market" (Pet. App. 17a).

[7] U.S. Supp. Br. on Reargument at 115; see also *id.* at 22, 65 (Equal Protection Clause requires government to be color blind.).

[8] Br. for Appellants in Nos. 1, 2, and 4 and Resp. in No. 10 on Reargument at 21.

for minority students (*id.* at 8a, 29a-30a). So casual a waving aside of the fundamental Fourteenth Amendment principle of equal treatment for all persons regardless of race and of our republic's basic moral vision of the unity of all mankind cannot be countenanced.

First, the courts below drew a wholly unwarranted connection between the general history of racial discrimination in this country, and the statistical underrepresentation of minority group members in the teaching corps relative to the student body—without even the semblance of an attempt to relate that disparity to some pattern or practice of conduct by the school board. Second, there is the further step of using this suppositious discrimination to justify a remedy which further undoes the connection between wrongdoer and victim to allow a person, say of Asian descent whose ancestors suffered discrimination in the early history of California, to attain for that reason a concrete advantage over petitioners in Jackson, Michigan, in 1982.

The third and final step in the shambling logic of this enterprise would justify the explicitly racially based layoff of petitioners on the ground that this is necessary to provide "role-models" for minority group students. Stripped of its veneer of unsupported psychological and sociological conjecture, this justification can only mean one of two things. It may mean that black, Hispanic or Asian students learn better if they are taught by black, Hispanic or Asian teachers. Or it may mean that such students, conscious of the injustices done to the groups of which they are members, will draw encouragement and a practical moral lesson from seeing members of their own (or some other) minority group in positions of authority and respect. As to the first of these justifications, no evidence for such an empirical effect was ever suggested, let alone examined and subjected to criticism and refutation. As to the second, the moral conclusions it teaches beg the question at issue. For one must assume that these students will be aware of the very system of racial preference which delivers role models in supposedly sufficient numbers. But what is the moral lesson that such a system teaches? Surely not that ours is a society in which each person can succeed as a result of his or her own work and talent. On the contrary, one may likelier suppose that such a system (its actual working laid bare) will teach a different and more sinister lesson: that one hundred and twenty years after the end of slavery government may still advance some and suppress others not as individuals but because of the color of their skin.

In this brief the United States shall argue, first, that the Fourteenth Amendment was intended to assure the equality before the law of all persons, of whatever race or group; second, that therefore any governmental action based on race or national origin bears the heaviest possible burden of justification; third, that racial quotas cannot lighten much less discharge this burden of justification by claiming to favor blacks or other disadvantaged groups and therefore claiming to be benign; and fourth, that compensating the victims of discrimination is consistent with these principles, as the compensation is directed to those who have actually suffered discrimination. Adherence to these constitutional principles is perfectly consistent with a benevolent social policy designed to provide fair opportunity and a sense of real equality to all persons.

ARGUMENT

THE JACKSON LAY-OFF QUOTA VIOLATES EQUAL PROTECTION

I. EQUALITY BEFORE THE LAW IS A FOUNDATIONAL PRINCIPLE OF AMERICAN GOVERNMENT

The United States' population is the most diverse in the world—indeed, probably in the history of the world. If present trends of immigration and population growth continue, racial and ethnic diversity will significantly increase in the remaining years of this century.

This diversity, potentially divisive and enervating, has proved to be a source of strength and cultural richness, a concrete manifestation of the universality of the principles on which this country was founded. Central among those principles is the equality of all persons before the law, regardless of race, religion, or ethnic background. The Declaration of Independence proclaimed that America was different from other countries because: "We hold these truths to be self-evident, that all men are created equal * * *." The inscription on the front of this Court reads: "Equal Justice Under Law." This is the principle that as a matter of historical fact has unified the many minorities that make up our population. See N. Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* 3-32 (1975).

This concept finds binding legal expression in the Equal Protection Clause of the Fourteenth Amendment: no state shall "deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause does not mention any of the characteristics that divide, such as race, religion, or national origin. It sees only "person[s]" and guarantees to every "person" the "equal" protection of the laws.

Equality before the law, so magnificent in principle, is often a difficult and uncomfortable concept in practice. There have always been and perhaps will always be voices seeking to carve out special exceptions to this principle based on history, prevailing social conditions, temporary need, or expediency. After the era of Reconstruction, such voices prevailed, and the true meaning of the Equal Protection Clause was long suppressed. In 1896, this Court approved the concept of "separate but equal" facilities for blacks and whites and thus upheld the arrest of Homer A. Plessy for occupying a railroad coach reserved for whites. *Plessy* v. *Ferguson,* 163 U.S. 537 (1896). According to his petition, Plessy was seven-eighths white and one-eighth black, and "the mixture of colored blood was not discernible in him" (*id.* at 541). Under Louisiana law, he was black, although in other states he apparently would have been white (see *id.* at 552). Whether, if living today, he would be regarded as black or white by the Jackson Board of Education is unclear. What is clear is that his Fourteenth Amendment rights as a person were violated. In one of the most famous and prescient dissents in the history of this Court, the first Justice Harlan wrote (163 U.S. at 559):

> [o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

This vision became the creed of the Civil Rights Movement[9] and eventually the nation.[10] It has informed and found expression in numerous decisions of this Court. See, *e.g.*, *Loving* v. *Virginia*, 388 U.S. 1 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184, 191-192 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 498 (1954). Under those cases, the status of most laws that discriminate on the basis of race or ethnic origin is perfectly clear. They are "constitutionally suspect" and subject to the "most rigid scrutiny." *McLaughlin* v. *Florida*, 379 U.S. at 191-193. As the Court affirmed only last Term, "to pass constitutional muster, [a racial classification] must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of its legitimate purpose." *Palmore* v. *Sidoti*, No. 82-1734 (Apr. 25, 1984), slip op. 4. Furthermore, a suspect classification must be precisely tailored. *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972); *Kramer* v. *Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

Beginning with the case of *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), this Court opened a new chapter in the constitutional history of racial and ethnic discrimination. What purportedly distinguished *DeFunis* from previous discrimination cases was that the victim, Marco DeFunis, Jr., was not a member of a "minority" group, at least as defined by the University of Washington Law School, *i.e.*, he was not "black, Chicano, American Indian, or Filipino" (*id.* at 320). Thus, discrimination against DeFunis, a Sephardic Jew from a relatively poor background,[11] was claimed to be "benign" and, in the judgment of the University, DeFunis could justly be called upon to sacrifice his aspirations for a legal career to serve the greater public good.

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[9] See page 4 & note 8, *supra*.

[10] See, *e.g.*, *Special Message to Congress on Civil Rights*, 1963 Pub. Papers of President Kennedy 221; *Radio and Television Remarks Upon Signing the Civil Rights Bill*, 1964 Pub. Papers of President Johnson 842, 843.

The present case falls into the same pattern. Here, petitioners lost their jobs as teachers because they are not "Black, American Indian, Oriental, or of Spanish descendancy" (Pet. App. 1a). Those seeking to justify this discrimination must show either (1) that so-called "benign" quotas should not be governed by the same constitutional standards that govern other forms of racial and ethnic discrimination or (2) that measures like the Jackson lay-off quota can satisfy those tests. We will address these points in turn.

II. LAWS THAT DISCRIMINATE IN FAVOR OF SOME MINORITY GROUPS MUST SATISFY THE SAME CONSTITUTIONAL STANDARDS AS OTHER FORMS OF STATE-SPONSORED RACIAL AND ETHNIC DISCRIMINATION

A. This Court has rendered two decisions concerning the constitutionality of racial classifications adopted by governmental entities for the purpose of benefitting members of specified minority groups: *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978); and *Fullilove* v. *Klutznick,* 448 U.S. 448 (1980). While neither case produced a majority opinion, a plurality of the Court appears to have concluded that state action granting preferences to minorities must satisfy strict scrutiny like all other state-sponsored racial classifications.[12]

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[11] J. Fishkin, *Justice, Equal Opportunity, and the Family* 90 (1983).

We fully endorse this conclusion because we see no valid justification for more lenient judicial scrutiny of laws that discriminate in favor of some minorities and against a residual category of "whites." The right to the equal protection of the laws is an "individual," "personal" right. *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948). See also, *e.g.*, *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938). Accordingly, this right applies equally to all persons "without regard to any differences of race, of color, or of nationality." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886); see also *Buchanan* v. *Warley*, 245 U.S. 60, 76 (1917). This right "cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Bakke*, 438 U.S. at 289-290 (opinion of Powell, J.); see also *DeFunis* v. *Odegaard*, 416 U.S. at 337 (Douglas, J., dissenting).

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[12] This standard of review was stated by Justice Powell in *Bakke*, 438 U.S. at 290-291. Justice White joined this portion of Justice Powell's opinion (*id.* at 387 n.7). In *Fullilove*, Justice Stewart, joined by Justice Rehnquist, declared that racial and ethnic classifications are "inherently suspect and presumptively invalid." 448 U.S. at 523. Justice Powell agreed (*id.* at 496-497 n.1), and Justice Stevens declared (*id.* at 551) that strict scrutiny would have applied if a state legislature had enacted the *Fullilove* program.

Neither the Chief Justice nor Justice O'Connor has commented on the applicable standard of review in this kind of case. In *Bakke*, the Chief Justice joined Justices Stevens, Stewart, and Rehnquist in an opinion that did not reach the constitutional question (438 U.S. at 408-421). In *Fullilove*, his opinion relied on Congress's unique power to enforce the Fourteenth Amendment (448 U.S. at 472-473, 483).

Several members of the Court have advocated a somewhat less exacting standard, but they have nevertheless insisted on a "strict and searching" judicial inquiry (see *Bakke*, 438 U.S. at 362) (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in judgment). See pages 18-19 & note 30, *infra*. Even this standard is stricter than the "reasonableness" test applied by the courts below (see Pet. App. 10a, 31a).

Equal Protection is a matter of "fundamental principle" and not simply "a matter of whose ox is gored." A. Bickel, *The Morality of Consent* 133 (1975).

B. The history of the Fourteenth Amendment does not support the constitutionality of measures discriminating against "whites." The Civil Rights Act of 1866, ch. 31, 14 Stat. 27 *et seq.*, which was enacted by the 39th Congress shortly before it proposed ratification of the Fourteenth Amendment, sheds initial light on the meaning of the Equal Protection Clause in view of the common roots and purposes of these two measures.[13] Congress's unequivocal objective in pasing the 1866 Act was to prohibit official racial discrimination against blacks *or* whites. Section 1 of the Act (14 Stat. 27) guaranteed that "citizens, of every race and color, * * * shall have the same right * * * to full and equal benefit of all laws and proceedings for the security of person and property." Senator Trumbull, the Act's sponsor, declared that its object was to "break down all discrimination between black men and white men" and that it applied "to white men as well as black men." Cong. Globe, 39th Cong., 1st Sess. 599 (1866). As Senator Howard, later a framer of the Fourteenth Amendment, commented, "[i]n respect to all civil rights, * * * there is to be hereafter no distinction between the white race and the black race." *Id.* at 504.

The purpose and effect of the Equal Protection Clause were the same. As proposed in the Reconstruction Committee,[14] Section 1 of the Fourteenth Amendment prohibited all governmental discrimination "as to the civil rights of persons because of race, color, or previous condition of servitude." [15] Although the committee changed this language, it is apparent that it did not intend to alter the principle of racial equality before the law.[16]

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[13] The 39th Congress considered the two measures simultaneously and enacted the Civil Rights Bill approximately two months before proposing ratification of the Fourteenth Amendment. One of the primary purposes of the Fourteenth Amendment was "to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land" and thus insulate them from repeal or invalidation. *Hurd* v. *Hodge*, 334 U.S. 24, 32-33 (1948); see also, *e.g.*, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968). In addition, Section 1 of the Act (14 Stat. 27) was a model for the Equal Protection Clause. Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. Rev. 131, 140 (1950).

This was confirmed in the opening speech by the House floor leader, Representative Stevens. Section 1, he explained, guaranteed individuals of both races exactly the same treatment by the states (Cong. Globe, 39th Cong., 1st Sess. 2459 (1866)):

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[14] Before Section 1 of the Fourteenth Amendment was cast in its present form, the 39th Congress considered several proposed Amendments that expressly and unqualifiedly proscribed racial discrimination. See B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 50 (1914); Cong. Globe, 39th Cong., 1st Sess. 1906 (1866).

[15] B. Kendrick, *supra*, at 83-84.

[16] Representative Bingham first sought unsuccessfully to add to this provision the present language of the Equal Protection Clause (B. Kendrick, *supra*, at 85), and Section 1 was adopted as it stood (by a vote of 10 to 2) (B. Kendrick, *supra*, at 86-87). Bingham later succeeded in adding as a new Section 5 all of what is now the second sentence of Section 1 (again by a vote of 10 to 2) (B. Kendrick, *supra*, at 87), but this was later deleted (B. Kendrick, *supra*, at 98-99). Finally, he convinced the committee to substitute this Section 5 for what was then Section 1. (This time the vote was 10 to 3) (B. Kendrick, *supra*, at 106). This history—with the committee voting at various times to adopt the original and ultimate versions of Section 1 separately and together—strongly suggests that the express meaning of the original version banning all "discrimination" by government "because of race [or] color" was regarded as incorporated within the version finally reported. For accounts of the committee proceedings, see 6 C. Fairman, *History of the Supreme Court of the United States—Reconstruction and Reunion* Pt. 1, at 1270-1274, 1281-1283 (1971); J. James, *The Framing of the Fourteenth Amendment* 103-116 (1956); H. Flack, *The Adoption of the Fourteenth Amendment* 65-69 (1965); H. Meyer, *The History and Meaning of the Fourteenth Amendment* 71-74 (1977); Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 40-45 (1955).

> Whatever law punishes a white man for crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all.

Later, he added (*id.* at 2766) that the Equal Protection Clause "abolishes all class legislation in the States" and "protects the black man in his fundamental rights with the same shield which it throws over the white man." In the Senate, the floor leader, Senator Howard, provided the same unequivocal explanation (Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)).

The deliberations on the Fourteenth Amendment also show that Congress specifically intended to protect two groups of whites who were in real danger of deprivation of civil rights. First, the term "person," rather than "citizen," was used in the Equal Protection Clause to encompass aliens. Although the earliest draft of Section 1 of the Fourteenth Amendment, introduced in December 1865 by Representative Stevens, applied only to "citizen[s]" (Cong. Globe, 39th Cong., 1st Sess. 14 (1865)), by February 1866 the Reconstruction Committee had approved a different version, offered by Representative Bingham, that guaranteed equal protection to all "person[s]." [17] Defending this amendment on the House floor, Bingham asked on February 28 (Cong. Globe, 39th Cong., 1st Sess. 1090 (1866)): "Is it not essential to the unity of the Government and the unity of the people that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?" Nine days later, commenting on the use of the term "citizen" in Section 1 of the Civil Rights Act, he stated (Cong. Globe, 39th Cong., 1st Sess, 1292 (1866)) that discrimination against aliens was "as unjust as the unjust State legislation" against blacks.[18]

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[17] B. Kendrick, *supra*, at 62.

[18] Earlier, Representative Stevens, the floor manager of the Fourteenth Amendment, and Representative Conkling, another

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In 1866, the overwhelming majority of aliens were white,[19] since the first sentence of Section 1 of the Fourteenth Amendment had confirmed that virtually all freed slaves were citizens.[20]

The other group of whites that Congress specifically wanted to protect were white Unionists in the South. When asked if the Amendment's sole purpose was to protect black freedmen, Bingham responded (Cong. Globe, 39th Cong., 1st Sess. 1088 (1866)) that it was intended "as well to protect the thousands and tens of thousands and hundreds of thousands of loyal white citizens of the United States whose property, by State legislation, has been rested from them under confiscation, and protect them also from banishment." See also *id.* at 1090-1091.

Those who argue that the history of the Reconstruction era supports the constitutionality of preferences for blacks rely chiefly on laws relating to the Freedmen's Bureau.[21] But whatever light these statutes shed on the intended meaning of the Equal Protection Clause, they do not support current measures containing racial and ethnic preferences. Rather, they are examples of compensation for actual, identified victims of discrimination. See Cong. Globe, 39th Cong., 1st Sess. 940 (1866) (remarks of Sen. Trumbull). They provided assistance, not to blacks generally, but to "freedmen," individuals

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member of the Reconstruction Committee, had made the same point. Cong. Globe, 39th Cong., 1st Sess. 359 (1866) (remarks of Rep. Conkling); *id.* at 537 (remarks of Rep. Stevens).

[19] See Bureau of the Census, U.S. Dep't of Commerce, *Historical Statistics of the United States* Pt. 1, at 99, 106, 108 (1975).

[20] That provision states that all persons born or naturalized in the United States and subject to its jurisdiction are citizens. This applied to virtually all former slaves, since importation of slaves ended in 1808 (Art. I, § 9, Cl. 1).

[21] See Br. of NAACP Legal Defense and Education Fund, Inc. as Amicus Curiae at 10-53 in *Regents of the University of California* v. *Bakke*, No. 76-811.

who were the victims of slavery.[22] Moreover, these laws also provided substantial assistance for white refugees; in fact, figures provided to Congress showed that two-thirds as many whites as blacks had received rations from the Bureau. Cong. Globe, 39th Cong., 1st Sess. 940 (1866).[23] It is thus difficult to discern in these laws any support for the constitutionality of current measures granting preferences, regardless of individual circumstances, to any black person or, even more remotely, to any member of other minority groups.[24]

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[22] Supporters emphasized that newly freed slaves had special needs resulting directly from years of bondage. See Cong. Globe, 39th Cong., 1st Sess. 939 (1866) (remarks of Sen. Trumbull); *id.* at 630 (remarks of Rep. Hubbard).

[23] The initial act (Act of Mar. 3, 1865, ch. 90, 13 Stat. 507 *et seq.*) established for one year a "bureau of refugees, freedmen, and abandoned lands" (§ 1, 13 Stat. 507), authorized the Secretary of War to provide aid to "destitute and suffering refugees and freedmen and their wives and children" (§ 2, 13 Stat. 508), and permitted abandoned and confiscated lands in the Confederate states to be set aside for the use of "loyal refugees and freedmen" (§ 4, 13 Stat. 508).

The second act (Act of July 16, 1866, ch. 200, 14 Stat. 173 *et seq.*) extended the life of the bureau for two years (§ 1, 14 Stat. 173), continued aid to needy refugees and freedmen (§§ 2, 5, 14 Stat. 174), addressed various administrative matters (§§ 3, 4, 14 Stat. 174; § 15, 14 Stat. 177), confirmed tax sales of certain lands to blacks (§ 6, 14 Stat. 174), provided for the disposition and administration of other confiscated and abandoned land (§§ 7-10, 11, 14 Stat. 175-176), allowed freedmen to continue occupying certain land under an Army field order until after the harvest and receipt by them of compensation for any improvements (§ 12, 14 Stat. 176), and instructed the commissioner to cooperate with benevolent societies for the aid of freedmen (§ 13, 14 Stat. 176). Finally, Section 14 of the Act (14 Stat. 176), far from granting a racial preference, guaranteed the rights and immunities of "all citizens" in the Confederate states "without respect to race or color, or previous condition of slavery," and authorized military tribunals to enforce these rights.

In 1868, the Bureau was continued for an additional year (Act of July 6, 1868, ch. 135, 15 Stat. 83). In sum, the Freedmen's Bureau measures provide no examples of race-conscious relief for non-victims.

C. Permissive judicial scrutiny of "benign" discrimination is sometimes defended on the principle that the courts have a special duty to protect minorities lacking political power. In the words of Dean John Hart Ely, a leading proponent of this view:

> When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking. A White majority is unlikely to disadvantage itself for reasons of racial prejudice * * *.

Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 735 (1974); see also J. Ely, *Democracy and Distrust* 170-172 (1980). This argument has at least three major defects.

First, it greatly oversimplifies and distorts the meaning of the Equal Protection Clause, making it nothing more than an enforcement mechanism for one particular theory of democratic government. There is no evidence that those who framed, proposed, and ratified the Fourteenth Amendment had this theory in mind. Instead, they believed for a variety of reasons—including the fact that immutable characteristics such as race and ethnicity are almost never relevant to a legitimate legislative purpose—that racial and ethnic classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943).

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[24] Three other minor Reconstruction-era statutes have been cited as examples of race-conscious relief. One was a $15,000 appropriation "for the relief of freedmen or destitute colored people in the District of Columbia" (Res. 3, 15 Stat. 20). The others established special protective procedures to ensure that black servicemen in former slave states were not cheated of their pay by claims agents. It seems safe to assume that virtually everyone aided by these enactments was a direct victim of slavery or racial oppression.

Second, Ely's argument is an oversimplification because it unqualifiedly equates numerical majority with political power and assumes that minority groups are politically powerless. In reality, the distribution of political power in a democracy is considerably more complex. Governmental decisionmakers directly or indirectly answerable to the voters are not always responsive to the majority's wishes. In addition, interest groups representing small segments of the population are sometimes able to influence the enactment of measures favorable to the group's members but of doubtful benefit to the electoral majority.[25]

Third, this theory assumes the existence of a polity with a monolithic white majority and black minority. The United States, however, is a nation of many minorities[26] (many of which overlap) and many, many political jurisdictions—50 states and nearly 80,000 units of local government.[27] Racial and ethnic groups are unevenly distributed among these jurisdictions, causing the terms "majority" and "minority" to have varying meanings. In more than 75 counties, blacks exceed 50% of the population; in 37 counties, more than 50% of the population is Hispanic. In eight of the ten largest cities, blacks and Hispanics constitute a majority.[28] Asian-Americans substantially outnumber whites in Hawaii.[29] In many communities, individuals of other cohesive, traditionally disfavored groups constitute substantial voting blocs.

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[25] See Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 Col. L. Rev. 557, 573-574 (1975).

[26] See *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 185 (1977) (Burger, C.J., dissenting) ("the 'whites' category consists of a veritable galaxy of national origins, ethnic backgrounds, and religious denominations. It simply cannot be assumed that the * * * interests of all 'whites' are even substantially identical").

[27] Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1985*, at 261 (105th ed. 1985).

[28] *Id.* at 25-26.

[29] *Id.* at 31.

Because of these factors, different groups, whether alone or in coalition, are in the majority in different jurisdictions. If the standard for constitutional scrutiny were to depend upon whether a preference benefited a "minority" or the electoral majority, the meaning of equal protection would have to vary from place to place and time to time and would thus acquire an "accordion-like quality." *DeFunis*, 416 U.S. at 343 (Douglas, J., dissenting). The courts would also be compelled to make a sensitive and sophisticated assessment of the real distribution of political power in each community. This is an inquiry for which courts are ill-suited.

These problems can be illustrated by attempting to apply this same theory to gender classifications. Should measures disadvantaging women be leniently reviewed because female voters outnumber male voters? Should measures disadvantaging men be leniently scrutinized because men occupy most electoral posts? This Court does not draw such distinctions but instead applies precisely the same level of judicial review no matter which gender is disadvantaged. See, *e.g.*, *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 723-724 & n.9 (1982).

D. Less stringent judicial scrutiny of racial preferences for blacks and members of some other minority groups is sometimes defended on the ground that such measures compensate for past wrongs or for what is termed "societal" discrimination. But this approach assumes that a measure is compensatory and relaxes scrutiny before accurately assessing whether that is so. In our view, nothing less than strict scrutiny can be trusted to determine whether a measure is truly compensatory.

The problems inherent in any approach less exacting than strict scrutiny are illustrated by the intermediate scrutiny test advocated by several members of this Court as the appropriate standard for reviewing purportedly compensatory preferences.[30] Applying this test, proponents have approved preferential benefits for individuals not shown to have suffered from any past discrimination;[31] preferential medical school admissions for members of minority groups that were already *overrepresented* in the student body;[32] and preferential treatment for minority businessmen whose economic resources and opportunities clearly exceeded those of the average citizen.[33] Indeed, this test has been found to allow both discrimination in favor of and discrimination against the very same minority groups—and all in the name of compensation.[34] These results dramatically illustrate the

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[30] See *Fullilove*, 448 U.S. at 517-521 (Marshall, J., concurring); *Bakke*, 438 U.S. at 324-379 (opinion of Brennan, White, Marshall, and Blackmun, JJ). Under this test, a racial or ethnic classification

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"designed to further remedial purposes" must "serve important governmental objectives" and must be "substantially related to the achievement of those objectives." *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring). In addition, there must be some rational basis for concluding that the preferred groups are more deserving of compensation than the groups disfavored. (*Bakke*, 438 U.S. at 359 n.35 (opinion of Brennan, White, Marshall, and Blackmun, JJ.)).

[31] *Bakke*, 438 U.S. at 377-378 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Fullilove*, 448 U.S. at 517-521 (Marshall, J., concurring).

[32] This was true of Chinese- and Japanese-American students in *Bakke*. See Posner, *The Bakke Case and the Future of "Affirmative Action,"* 67 Cal. L. Rev. 171, 185-186 (1979).

[33] Compare *Fullilove*, 448 U.S. at 520-521 (Marshall, J., concurring), with *id.* at 538-539 (Stevens, J., dissenting).

[34] The statute in *Fullilove*, which some Justices would have tested and sustained under intermediate scrutiny (448 U.S. at 517-521) (Marshall, J., concurring)), gave a preference to all Spanish-speaking citizens (see *id.* at 459). By contrast, the admissions program in *Bakke*, which was likewise found to pass intermediate scrutiny (438 U.S. at 355-379) (opinion of Brennan, White, Marshall, and Blackmun, JJ.)), favored only "Chicanos," *i.e.*, Mexican-Americans, while all other Hispanics, including such groups as Puerto Ricans, Cubans, and Central Americans, were required to shoulder part of the burden of providing compensation (see *id.* at 274).

Such results are not a quirk of the particular test employed but are an inevitable consequence of attempting to provide compensation to groups rather than individual victims. Many groups have suffered substantial discrimination in this country. Putting aside the special case of past discrimination against blacks, need for strict scrutiny to identify those measures that are truly remedial and compensatory.

E. A final argument for permissive scrutiny of measures discriminating in favor of certain minority groups would justify them in terms of their supposedly benign symbolism: such classifications, it is asserted, do not stigmatize or brand the victims as inferior.[35] This argument loses sight of the equal protection ideal that individuals should not be helped or hurt by government on the basis of race or ethnic background. Instead, this theory incorrectly suggests that the Equal Protection Clause is more concerned with the symbolism than the concrete effects of racial and ethnic discrimination—loss of money, a job, education, a place to live, etc.

This argument fails as well even on its own terms. A defense of racial preferences on "symbolic" grounds is perilously vague and subjective. See *Bakke*, 438 U.S. at 294-295 n.34 (opinion of Powell, J.). The symbolism of benign concern intended by the defenders of such schemes may not be the symbolism discerned by the schemes' beneficiaries and victims or the public at large. These may rather infer that in our society benefits and opportunities are not to be obtained by merit but by successful manipulation of the politics of racial and group patronage.

Nor does it seem possible to identify any significant generic differences between the potential symbolic effects of disabilities and preferences. A disability may be seen as a brand of inferiority, but a paternalistic preference

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it is very difficult to say with any assurance that any of the remaining groups suffered greater discrimination than the rest. A "rational" case can be made that each group is especially deserving; but it is doubtful that a substantially stronger argument can be made on behalf of any group. Accordingly, if there must simply be a rational basis for the choice of groups preferred in an affirmative action plan, governmental units are apparently free to pick and choose among minority groups as they wish. If anything more than a rational basis must be shown, it seems doubtful that any of the groups noted above can be preferred.

[35] See *Fullilove* v. *Klutznick*, 448 U.S. at 518 (Marshall, J., concurring).

may carry exactly the same symbolic meaning, as many members of this Court have noted.[36] A disability may single out a minority group and thereby endorse and even encourage public hostility towards its members. But, again, so may a preference; a preference may arouse sharp resentment among those who are not preferred.

F. In arguing for a unitary standard of review for all racial and ethnic classifications, we do not equate or confuse a measure like the Jackson lay-off quota with the vicious discrimination of the Jim Crow era. However, the Equal Protection Clause is not merely a protection against the most flagrant wrongs. It embodies a broad principle of equality that is subverted unless applied equally to all racial and ethnic classifications. A. Bickel, *The Morality of Consent* 132-133 (1975).

Laws granting preferences to members of enumerated minority groups are also far from benign in practical effect. Such preferences inevitably harm innocent individuals. Whether a Plessy is ejected from a railroad coach because he is one-eighth black or laid-off because he is seven-eighths white, the concrete wrong to him is much the same. Whether a DeFunis is excluded from law school because he is Jewish or because he is not "Black, American Indian, Oriental, or of Spanish descendancy," his personal aspirations are equally thwarted.

Preferences also perpetuate and foster racial and ethnic divisions. And in a pluralistic and democratic society such as ours, when preferences are granted to some groups, there is inevitable pressure for similar preferences to benefit every group that can mount a claim of past discrimination.

Racial and ethnic preferences necessarily mar the law with definitions of racial and ethnic types, laws that are disquietingly reminiscent of abhorrent measures enacted in other times and places.[37] And if preferences are sustained, a ready-made legal framework is thereby created for racial and ethnic policies of more malevolent design.

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[36] See page 23, *infra.*

[37] See *Fullilove,* 448 U.S. at 534 n.5 (Stevens, J., dissenting).

III. THE JACKSON LAY-OFF QUOTA CANNOT SATISFY THE CONSTITUTIONAL STANDARDS APPLICABLE TO MEASURES CONTAINING RACIAL AND ETHNIC CLASSIFICATIONS

The lay-off quota adopted by the Jackson school board emphatically flunks the constitutional standards governing racial classifications.

A. The lower courts justified the Jackson measure in large part on the theory that it serves to provide "role models" for minority youths, but this superficially appealing justification is multiply flawed. In the first place, we believe that special wariness is appropriate whenever an attempt is made to justify a racial classification, not for the purpose of righting past wrongs, but simply because it is asserted that social institutions would work better or more smoothly. Variations of this argument prevailed in *Plessy* and *Hirabayashi*, with regrettable results. However, except for such wrong turns, the Court has consistently and soundly rejected calls that the equal-protection rights of individuals be sacrificed to serve some abstract societal good. See, *e.g.*, *Palmore* v. *Sidoti*, No. 82-1734 (Apr. 25, 1984); *Lee* v. *Washington*, 390 U.S. 333 (1968); *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958). For "[t]he Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *DeFunis* v. *Odegaard*, 416 U.S. at 342 (Douglas, J., dissenting).[38]

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[38] The role model justification seems clearly inconsistent with *Palmore*, which held that a state court, in awarding custody of a child, could not rely upon the race of the divorced mother's new husband. Few would deny that a child's most important role models are usually his parents. Thus, if a state's interest in providing children with role models of the same race were sufficient to override the principle of racial equality contained in the Fourteenth Amendment, it would appear that a state court should at least be permitted to take the race of the new husband into account in awarding custody. But *Palmore* properly prohibited this practice.

In this case, the role-model justification adopted by the lower courts falls far short of sustaining the Jackson lay-off quota. We do not dispute the fact that young people benefit from positive role models. Nor do we dispute the fact that minority youths, disheartened by past and present discrimination, often need minority role-models. But it is most doubtful that the Jackson lay-off quota will serve or is needed to serve this goal.

The Jackson measure, like all racial preferences, may undermine, rather than foster, minority role models.[39] See *Fullilove* v. *Klutznick*, 448 U.S. at 545, 547 (Stevens, J., dissenting); *id.* at 531 (Stewart, J., dissenting); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 173-174 (1977) (Brennan, J., concurring in part); *Regents of the University of California* v. *Bakke*, 438 U.S. at 298 (opinion of Powell, J.); *DeFunis* v. *Odegaard*, 416 U.S. at 343 (Douglas, J., dissenting); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1, 17 & n.35. The most powerful role models are those who have succeeded without a hint of favoritism. For example, Henry Aaron would not be regarded as the all-time home run king, and he would not be a model for youth, if the fences had been moved in whenever he came to the plate.

There are other, better ways for the schools to provide role models for minority youth. Any discrimination against minority teaching applicants can and should be stamped out. Minority group members who have achieved success in various walks of life can be invited and en-

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The invalidity of the role-model justification in the present, weaker context would appear to follow *a fortiori*.

[39] As Professor Thomas Sowell has written (*Black Education, Myths and Tragedies* 292 (1972) (emphasis in original)):

> What all the arguments and campaigns for quotas are really saying, loud and clear, is that *black people just don't have it*, and that they will have to be *given* something in order to have something. The devastating impact of this message on black people—particularly black young people—will outweigh any few extra jobs that may result from this strategy.

couraged to visit the schools and to discuss their careers and the students' aspirations. Courses of study can be developed so as not to overlook the notable contributions of minorities. The schools can and should ensure that teachers, of whatever race, are sensitive to the special needs of minority students. In view of these alternatives, the Jackson lay-off quota is not necessary to provide minority role models, and it accordingly cannot be justified on this ground. *Palmore*, slip op. 4; *Bakke*, 438 U.S. at 314-315 (opinion of Powell, J.). At the very least, the board has failed to carry its burden of showing a compelling educational need for its particular program, which (a) treats all "minority" and nonminority teachers as fungible for role model purposes,[40] (b) aims for rigid statistical parity between the percentage of minority students and teachers and (c) in the meantime, prohibits any layoff that would decrease whatever percentage of minority teachers happens to have been achieved at the time when lay-offs become necessary.

The role-model justification also beckons down forbidden paths. It is an argument for quotas in every profession and occupation, for minority students properly aspire to careers in every walk of life. The logic of the role-model argument might also serve to justify segregated classrooms. If the educational development of minority students urgently demands the presence in their schools of minority teachers to serve as role models—indeed demands the presence of minority teachers in mathematical proportion to the racial composition of the student body—then it is not easy to see why minority students would not be served best if they were actually taught by minority teachers. These dangerous implications are underlined by the fact that the role-model argument or variants of it have frequently been advanced as a defense by school boards charged with illegally segregating minority teachers in predominantly minority schools.[41] For example, in *Smith* v. *Board of Education*, 365 F.2d 770 (8th Cir. 1966), the school board argued that it could legally prefer white teachers to instruct white pupils because "rapport between teacher and pupil * * * may be unattainable where they are of different races and this difference affects attitudes, personal philosophies and prejudices." *Id.* at 781. The court, in an opinion by then Judge Blackmun, rejected this argument in unequivocal terms (*id.* at 782).

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[40] It is far from obvious that a teacher belonging to one of the preferred minority groups is necessarily any more capable of serving as a role model for students belonging to another preferred group than is a teacher belonging to a disfavored group. For example, is it clear that black students will be more inspired by a teacher of Chinese or Japanese ancestry than by a teacher of Jewish or Lebanese heritage?

B. The lower courts also justified the Jackson measure as a cure for "substantial and chronic underrepresentation" of minority teachers. But the use of racial classifications for the sole purpose of curing statistical underrepresentation (or, in plainer terms, imposing quotas) is proscribed by the Fourteenth Amendment. As Justice Powell concluded in *Bakke* (438 U.S. at 307): "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." [42]

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[41] See, *e.g.*, *Reed* v. *Rhodes*, 607 F.2d 714 (6th Cir. 1979), cert. denied, 445 U.S. 935 (1980); *United States* v. *School District*, 521 F.2d 530 (8th Cir.), cert. denied, 423 U.S. 946 (1975); *Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975); *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975); *Arthur* v. *Nyquist*, 415 F. Supp. 904 (W.D.N.Y. 1976), aff'd and rev'd in part, 573 F.2d 134 (2d Cir.), cert. denied, 439 U.S. 860 (1978).

[42] In relying upon what they viewed as chronic underrepresentation of minority teachers to justify the Jackson lay-off quota, the lower courts were apparently confused by *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), in which the Court held that Title VII of the Civil Rights Act of 1964 was not violated by a provision in a private-sector collective bargaining agreement granting racial preferences in a craft-training program. *Weber*, however, has no application in the present case because it did not involve state action and thus did "not present an alleged violation of the Equal Protection Clause" (*id.* at 200). Moreover, even if ap-

C. 1. Finally, the lower courts justified the Jackson measure as a means to redress "societal discrimination." We readily agree that providing a remedy for individual victims of discrimination is a compelling interest, but measures granting preferences to all members of a few minority groups cannot be justified in the name of compensation for "societal discrimination."

In the first place, such measures are compensatory or remedial in name only. Because the Equal Protection Clause protects personal not group rights, a measure cannot be fairly characterized as a remedy for a violation of equal protection unless it provides relief to an individual who was personally victimized by discrimination. Nor can a measure be termed remedial if the benefit conferred is not in some way measured by the nature and extent of the prior violation. When benefits do not correspond to any identified prior wrong and are not directed to the victim of such a wrong, they cannot in any meaningful sense be termed compensatory or remedial.

For essentially the same reasons, categorical preferences can never be regarded as "precisely tailored" to remedy discrimination. Such measures are fatally underinclusive because the groups usually singled out for preferential treatment "are not the only groups that have been discriminated against in this country." Posner, *The Bakke Case and the Future of "Affirmative Action,"* 67 Cal. L. Rev. 171, 176 (1979). See also J. Fishkin, *Justice, Equal Opportunity, and the Family* 98-99 (1983); J. Wilkinson, *From Brown to Bakke* 278-279 (1979). Categorical preferences are also impermissibly overinclusive because "[i]n today's society, it constitutes far too gross an over-simplification to assume that every Negro, Spanish-speaking citizen, Oriental, [or] Indian * * * suffers

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plicable, *Weber* would not support the lower courts' decisions in this case because the record does not show that the percentage of minority teachers in the work force exceeded the percentage on the Jackson faculty (compare *Weber*, 443 U.S. at 198-199). In addition, in this case, unlike *Weber*, the racial preference caused the discharge of innocent non-minority employees (compare *id.* at 208).

from the effects of past or present racial discrimination." *Fullilove*, 448 U.S. at 530 n.12 (Stewart, J., dissenting); see also *id.* at 537-538, 546 (Stevens, J., dissenting). Indeed, it is one of the ironies of racial preferences that those who benefit are seldom the most disadvantaged. Many minority group members and some minority groups as a whole have now surpassed the residual category of "whites" in income, education, and other measures of success.[43] Furthermore, many individuals given preference under affirmative action plans, while perhaps disadvantaged in some respects, are not even the indirect victims of discrimination in this country. This is often true of recent immigrants who happen to fall into one of the preferred groups.

Precise tailoring requires that the remedy fit a proven violation of law. See, *e.g.*, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977); *Milliken* v. *Bradley*, 418 U.S. 717, 738, 746 (1974) (an equal protection remedy is "necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct"). This means, as Justice Stewart stated in *Fullilove* (448 U.S. at 530 n.12), that "[e]xcept to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race." Justice Stevens recognized the same principle in *Fullilove* when he observed (*id.* at 541) that the statutory preference could not "be justified as a remedial measure" for firms that had not been "wrongfully excluded from the market for public contracts."[44]

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[43] This is true, for example, of Chinese- and Japanese-Americans (see T. Sowell, *The Economics and Politics of Race* 49, 187 (1983)), groups that suffered severe de jure discrimination and are included among the minorities given preference in the Jackson lay-off quota.

[44] In *Fullilove*, neither the plurality opinion nor that of Justice Powell approved the award of benefits to non-victims at the expense of innocent third parties. In the plurality opinion, the Chief

No other remedial principle is compatible with the cardinal rule that government may neither favor nor disadvantage a person solely because of race or ethnicity. When government provides compensation to individual victims, government is not itself making or implementing a racial classification. The victims compensated may all be members of the same racial or ethnic group, but this is merely because the guilty party's unlawful behavior was defined by race.

Nor does any other remedial principle pay sufficient heed to the rights of innocent parties. Although a valid remedy for individual discrimination may require some sharing of the burden by innocent parties (*Fullilove*, 448 U.S. at 484 (plurality); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 777 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975)), such individuals will simply be placed in the situation that would have existed had the discrimination not occurred. But unless a remedy benefits an actual victim of discrimination, "the government has [no] greater interest in helping one

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Justice stressed (448 U.S. at 486) that the Court was considering only a facial challenge to the minority set-aside provision and that equal protection claims arising out of specific awards that "cannot be justified * * * as a remedy for present effects of identified prior discrimination * * * must await future cases." The Chief Justice also emphasized Congress's intention that a preference should be given to only those firms "whose competitive position is impaired by the effects of disadvantage and discrimination" (*id.* at 471; see also *id.* at 464) and that the administrative process would prevent misapplications of Congress's goals (*id.* at 487-489). The *Fullilove* plurality did not suggest that the statute at issue in that case, which may have "pres[sed] the outer limits of congressional authority" (*id.* at 490), would have been upheld had it extended preferences to firms based solely on race rather than their "impaired * * * competitive position" resulting from the "present effects of past discrimination" in government construction contracts. None of these factors is present here. Petitioners were personally and substantially harmed by the lay-off quota, and no effort whatsoever was made to inquire whether those preferred at petitioners' expense were the actual victims of discrimination or disadvantage.

individual than in refraining from harming another" (*Bakke*, 438 U.S. at 309 (opinion of Powell, J)).[45]

2. The Jackson measure cannot be justified as a means of providing compensation for individual victims of discrimination. Neither the school board nor the courts below found that the board had ever engaged in discrimination. The absence of such a finding alone requires the invalidation of the lay-off quota. *Bakke*, 438 U.S. at 302-310 (opinion of Powell, J.); see also *Bushey* v. *New York State Civil Service Commission*, No. 84-336 (Jan. 7, 1985), slip op. 4 (opinion of Rehnquist, J., Burger, C.J., and White, J., dissenting from denial of certiorari).

Furthermore, the board does not have the constitutional competence to make a finding that justifies the use of a racial classification for remedial purposes. Like the Regents in *Bakke*, the Board's "mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality." *Bakke*, 438 U.S. at 309 (opinion of Powell, J.). Factfinding by a state or local entity also cannot be equated with that of Congress because, among other things, the states are not granted the enforcement power under Section 5 of the Fourteenth

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[45] The same remedial principle guided the Court in its recent decision regarding the scope of a federal court's remedial authority under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* See *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984). With much the same values and interests at stake, the Court ruled that the policy behind the remedial provision of Title VII, Section 706(g), 42 U.S.C. 2000e-5(g), is to "provide make-whole relief only to those who have been actual victims of illegal discrimination." *Stotts*, slip op. 16-17; see also *Teamsters* v. *United States*, 431 U.S. 324, 367-371 (1977). This holding is particularly instructive since Title VII has been held to allow greater leeway for racial preferences than would be permitted for an entity subject to the Fourteenth Amendment. See *United Steelworkers* v. *Weber*, *supra*. Justice O'Connor implicitly pointed out the breadth of this principle when she wrote in *Stotts* (concurring slip op. 5 (emphasis added)), citing both Title VII and Fourteenth Amendment precedent, that "[a] court may use its remedial powers * * * only to prevent future violations and *to compensate identified victims of unlawful discrimination.*"

Amendment that many members of the Court found important in upholding the Act of Congress challenged in *Fullilove*. See 448 U.S. at 476-478, 483, 490-491 (plurality opinion); *id.* at 499-502 (opinion of Powell, J.); see also *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976); *Bushey*, dissenting slip op. 4.

A court of equity may of course make a finding of racial discrimination, but no such finding could be made on the record in this case. The lower courts relied exclusively on statistics showing that there was a difference between the percentage of minority teachers and students during a brief span of years more than a decade ago. This difference, however, might have resulted from any of numerous innocent causes and unquestionably does not show the discriminatory intent needed to establish an Equal Protection Clause violation. *Hazelwood School District* v. *United States*, 433 U.S. 299, 308 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 (1977); *Washington* v. *Davis*, 426 U.S. 229, 243 (1976); *Janowiak* v. *City of South Bend*, 750 F.2d 557, 564 (7th Cir. 1985).

More fundamentally, as we have shown, even a finding that there had been past discrimination against *some* individuals would not support a *categorical* racial and ethnic preference such as that contained in the Jackson agreement. No findings, then, can justify the challenged Jackson measure. Even if the board or lower courts had found a constitutional violation (and they did not) and even if they were to find such a violation on remand (and they could not on the present record) the Jackson quota could not be supported.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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Mr. **Edwards**. I do understand that you have a time problem. We will move along pursuant to the 5-minute rule.

The gentleman from Illinois, Mr. Hayes.

Mr. **Hayes**. Thank you, Mr. Chairman.

Mr. **Martinez**. Mr. Hayes, would you yield for just one question to clarify something?

Mr. **Hayes**. I'll be glad to yield to the gentleman.

Mr. **Martinez**. Mr. Reynolds, I was listening to the exchange between you and Mr. Hawkins, and it boiled down to a philosophy that you have—correct me if I'm wrong—that you believe that quotas discriminate against someone.

Mr. **Reynolds**. I certainly do.

Mr. **Sensenbrenner**. Mr. Chairman, I have a parliamentary inquiry.

Mr. Reynolds did state that he had to leave by 10:30, and I see we are now in our second round of questioning. What are the rules today?

Mr. **Martinez**. It's just going to be one question.

Mr. **Edwards**. This is on the time of the gentleman from Illinois, Mr. Hayes, and I'm keeping very careful time.

Mr. **Martinez**. What would you do, in your position, if there was a company in an all-black area that did not hire any blacks at all and yet you knew that there were qualified blacks for that particular employment, and that quite a few blacks had applied for the job but none been accepted.

Mr. **Reynolds**. On your hypothetical, we would file a lawsuit under Title VII, and we'd insist that the full package of remedial relief that we have been putting in place for the last 4 years would be applied to that company.

Mr. **Martinez**. Would you then insist, as proof of your remedial action, on the hiring of one black?

Mr. **Reynolds**. I wouldn't look at it in terms of numbers, no.

Mr. **Martinez**. Well, how do you get remedial action?

Mr. **Reynolds**. You take a look at the recruitment activity and the hiring practices and the applicant pool and see if they are hiring qualified people out of that applicant pool in a nondiscriminatory way.

Mr. **Martinez**. And nothing happens.

Mr. **Reynolds**. As you described it, it would be impossible for nothing to happen, because part of your hypothetical was that it was a discriminatory practice that had been going on, and there were qualified blacks who would be hired.

Mr. **Martinez**. Still, the people that are in the plant making the decision are not blacks, and they still refuse to hire a black, and they say, "Hey, these people are simply not qualified." On your premise that only a qualified person should be hired. Would you insist that they hire a black?

Mr. **Reynolds**. The way you've constructed it means that in those circumstances and at that particular point in time you have helped me immensely in identifying a victim of discrimination, and that individual would get the full benefit of make-whole relief.

Mr. **Martinez**. So, you would insist that they hire one black.

Mr. **Reynolds**. I would insist that they hire whatever number of blacks are entitled to be hired on a nondiscriminatory basis, and all those that have been discriminated against and are victims of discrimination should be hired, and that may include as many as 685 people in one case where we applied that remedy and as few as 1 or 2 people in another case.

Mr. **Martinez**. Then you have set a number—right?

Mr. **Reynolds**. I have set a standard that says that any victim of discrimination is hired, whatever the number, and everybody who is qualified comes into the work force, whatever arbitrary number one might otherwise pick as being reflective of a balance in the community.

Mrs. **Schroeder**. Would the gentleman yield?

Mr. **Martinez**. Yes.

Mrs. **Schroeder**. I think the problem is that we think people discriminate and he thinks quotas discriminate, and that may be the problem.

Mr. **Martinez**. I yield back the time to Congressman Hayes.

Mr. **Hayes**. I want to respect the time constraints under which our illustrious witness is operating. I wasn't conscious of it until he just said it, Mr. Chairman.

I only have one question I'm going to raise, because I am concerned about the Justice Department and the role that our government intends to play in the suit that they have filed in Chicago, which is an assault, as I see it, on affirmative action. It relates to the fire and police departments.

As you know, the police department in Chicago numbers somewhere around 11,000 people. Less than 40 percent of them are minorities, which is not reflective of the population of the city of Chicago—that low number. Roughly around 3,000, I guess, are black.

What we have been told is that the efforts of the Justice Department, which have created quite an upstir, particularly among civil rights groups—and some people who have agreed, and supported, and fought for years to try to bring about this change—there is some feeling that the government is lining up on the side of what is wrong.

I guess the bottom line charge is of reverse discrimination against whites in this kind of suit.

Now, what do you hope to accomplish with this? What does the Justice Department hope to accomplish by instituting this kind of suit?

What it is going to do, it is going to cause people to really organize and resist any attempt to take away that which we have made, and we have gained, and we have improvements in the whole area of affirmative action in our police and fire departments in the city of Chicago.

I assume that you know about this, because it is, I guess, scheduled to be heard sometime in the fall. I know that this is the kind of thing that I, as a Congressman, have to be able to give some leadership in the struggle to try to retain at least that which we have won over the years and not be in a position where people are laid off or discharged in order to rectify what you contend to be a wrong, or reverse discrimination. What do you hope to accomplish with this kind of suit?

Mr. **Reynolds**. Congressman, we aren't asking in any of these jurisdictions that any of the hiring that has taken place under these decrees be upset, or disrupted, or altered in any way. Our request is only directed at the prospective or future practices that would be conducted under ongoing decrees, and, as to future hiring and promotions, our position is simply that we believe they ought to be done on a nondiscriminatory basis.

Mr. **Edwards**. The time of the gentleman has expired.

We are going to let you go, Mr. Reynolds. I'm sorry we've kept you longer than we had planned, and I'm going to forego any questions that I might ask, other than to say that, for all of these years that we have had you before us, you have been a competent adversary, and the situation has always been adversarial.

I respect the fact that you are not giving your own views necessarily all the time, but that President Reagan agrees with your view of civil rights.

It has been difficult for this subcommittee. We did have the problem of the extension of the Voting Rights Act. You refused to come and testify, and so did the Attorney General, and the administration opposed the bill until the last moment.

We have problems on affirmative action with you that we have been discussing. This is the same problem that the entire minority community of the United States is having, with the exception of the few people you have been able to hire. The same differences exist with school desegregation. Now we are wrestling with you on the Civil Rights Restoration Act where, once again, we have real problems, and indeed the bill is imperiled because of your opposition to H.R. 700. We also are disturbed with your efforts in North Carolina to limit the new section 2 of the Voting Rights Act.

I certainly respect that you have the right to do this, but that the majority of this subcommittee disagrees with you very strongly.

Mr. **Hayes**. Would you yield for just one question Mr. Chairman?

Mr. **Edwards**. Yes.

Mr. **Hayes**. Am I to understand, before the witnesses leave, that the record is going to be kept open to permit some further questions?

Mr. **Edwards**. Yes.

Mr. **Hayes**. OK.

Mr. **Edwards**. Without objection, it is so ordered.

Thank you, Mr. Reynolds.

Mr. **Reynolds**. Thank you very much, Mr. Chairman.

Mr. **Edwards**. Our first panel this morning consists of legal experts. Julius Chambers is director-counsel of the NAACP Legal Defense and Educational Fund, and Professor Elizabeth Bartholet is from Harvard Law School.

We are delighted to have you both. We are sorry we kept you waiting.

Without objection, both of your statements will be made a part of the record, and who wants to go first?

Ms. **Bartholet**. We don't care. We thought we'd leave it to you, Mr. Edwards.

Mr. **Edwards**. Mr. Chambers.

TESTIMONY OF JULIUS CHAMBERS, DIRECTOR-COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, AND ELIZABETH BARTHOLET, PROFESSOR, HARVARD LAW SCHOOL

Mr. **Chambers**. Thank you, Mr. Chairman.

My name is Julius LeVonne Chambers, and I am director-counsel of the NAACP Legal Defense Fund.

In the brief comments that I will make, understanding that my written statement will be made a part of the record, I would like to emphasize three things that, I think, came out during the discussion or questioning and comments of Mr. Reynolds.

The first is that there is a history of discrimination that we are trying to address with affirmative race-conscious remedies, and for a moment I'd like to talk about them.

Many of us recall the history of the court efforts to enforce *Brown* v. *Board of Education.* We started in 1954 trying to get school districts across the South to implement the *Brown* decision.

It was not until 1969 that we got a decision from the Supreme Court in a school case out of Virginia requiring affirmative efforts to disestablish State-imposed segregation. That was a clear indication from the Court that efforts to implement *Brown* would require race-conscious remedies and affirmative efforts on the part of the discriminating jurisdiction.

In the employment area, as we attempted to implement title VII, we had general injunctive orders and then a long history with very little progress in ending discrimination. It was only with race-conscious remedies and affirmative action that we began to see major efforts to ensure minority employment in private and public industries.

In the voting rights area, for years we sought legislation to ensure equal rights. It was not until Congress enacted statutes like the Voting Rights Act, requiring affirmative efforts and race-conscious remedies, that we began to see minority opportunity in voting.

As we look today at affirmative action challenges by the Department of Justice, we should not forget the history of blatant discrimination that existed in this country and the years of experience we have had with neutral remedies, including affirmative recruiting, as suggested by Mr. Reynolds.

A second point that I would emphasize is that, over the past 20 years, and indeed 30 years, as we grappled to develop a plan that would be effective in eradicating a history of discrimination and the remaining vestiges, we had a divisive period of litigation.

What we see today being reintroduced by the Justice Department are the same arguments that were advanced in the 1950's and the 1960's and the early 1970's. This, again, is an effort to create division between the races, between the sexes.

As Congressman Hayes raised the question a moment ago about the purpose for the litigation in Chicago, one might raise the same question about the other cases filed by the Department of Justice. If we wanted to get a true determination by the Supreme Court of what is meant by the *Stotts* decision, we do not need 51 jurisdictions, nor do we need the number of cases that the Department of Justice has become involved in.

Third, I think we should put in context what has been happening with the Department of Justice's affirmative action litigation. We have an assault not just on remedies in important areas but an assault on civil rights efforts across the board.

We have desegregated a number of schools over the past 20-some years, and now the Department of Justice is assisting school districts in reopening cases and advocating return to neighborhood schools in a way that would simply resegregate the schools that have been desegregated over the years.

In the employment area, we see the Department of Justice reopening cases, again, relitigating a history that we thought or had hoped was settled long ago.

In the voting rights area, we see the Department of Justice continuously challenging remedies and legislation that would ensure opportunities for minorities to register and vote.

In returning to the affirmative action challenges of the Department of Justice, we are told that the present effort is based on the *Stotts* decision. I'm sure that the committee and Congress have heard these challenges by the Department of Justice over the past 4 years or so, and I won't repeat them. I simply note that if we adopted the Department's position, we would be back where we were prior to 1954, when separate and equal or separate and—as we know what was existing at that time—unequal was constitutional.

Let me tell you why. Many people assume that employers today have stopped discriminating. Some people assume that school districts have desegregated and are not discriminating, as in the past. Some people assume that people can purchase homes wherever they want without consideration of race or color. Some people assume that people can vote without being intimidated or harassed in their efforts.

But in our program with the Legal Defense Fund, we know that discrimination continues rampant today and that the remedies that we need to correct those past practices as well as the continuing practices of discrimination are those we developed over the years, those sustained by legislation by this Congress and by decisions of the U.S. Supreme Court.

I want to mention two examples in closing.

We are involved in litigation now attempting to ensure minority opportunities in higher education. In the whole State of Tennessee, minorities constitute less than 4 percent of the students enrolled in graduate and professional programs.

In an effort to try to correct this, we developed a plan that would ensure that at least 75 minorities would be identified and prepared to enter into the graduate and professional programs of the State of Tennessee.

The Department of Justice has challenged this plan as reverse race discrimination. At the same time, it has offered no remedy that would ensure increased minority enrollment in the graduate and professional schools. What it offers is the same plan that has existed in the past years with, again, the limited minority enrollment.

A second case involves my former hometown of Charlotte, NC, where we began litigation in 1964 with a rigidly segregated community.

Mr. Edwards. Mr. Chambers, we are going to have to recess for a few minutes to vote on the floor of the House of Representatives. We apologize. The committees will stand in recess for about 10 minutes.

[Recess.]

Mr. Edwards. The subcommittees will come to order.

Mr. Chambers, you may proceed.

Mr. Chambers. Thank you, Mr. Chairman.

I was about to conclude my remarks by saying that the position now advanced by the Department of Justice with respect to affirmative action should be weighed or evaluated in the context of the Department's overall efforts to cut back on civil rights.

The arguments it has advanced in support of its position are simply rationales for justifying or attempting to justify without, I submit, sound legal basis, an effort to deprive plaintiffs in civil rights cases and employers who want to correct a history of discrimination of the only effective tool for doing so.

Affirmative action race-conscious remedies are constitutional remedies that have been approved by the Supreme Court, that have been approved by Congress, and I think that those type remedies will be sustained by the courts and by the Congress in the years to come.

What you are doing in this hearing today is important for those of us in the struggle for civil rights, because you help to educate the public with these hearings about the fallacy of the positions now being advanced, about the need for continued attention to ridding this country of the blatant discriminatory practices of the past and because you help all of us to advance equal opportunities for all Americans.

I thank you.

[The statement of Mr. Chambers follows:]

STATEMENT

of

JULIUS LeVONNE CHAMBERS, DIRECTOR-COUNSEL,
NAACP Legal Defense and Educational Fund,
Inc., Regarding The Status and Future of
Affirmative Action to End The Effects of
Racial Discrimination and Segregation

Before

The Subcommittee on Civil and Constitutional
Rights of the House Judiciary Committee

and

The Subcommittee on Employment Opportunities
of the House Committee on Education and Labor

July 11, 1985

Mr. Chairmen and members of the Subcommittees:

Thank you for affording me the opportunity to testify concerning the status and future of affirmative action. My name is Julius LeVonne Chambers and I am Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc.[1]

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[1] Mr. Chambers became Director-Counsel of the NAACP Legal Defense and Educational Fund on July 1, 1984. He previously had served as President and Board member of the Fund. While in private practice in Charlotte, North Carolina, Mr. Chambers litigated numerous major civil rights cases, including *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *Scott v. Winston Salem/Forsyth County Board of Education*, 444 F.2d 99 (4th Cir. 1971); *Wheeler v. Durham Board of Education*, 303 F.2d 738 (4th Cir. 1966), further proceeding, 379 F. Supp. 1352 (M.D.N.C. 1974), aff'd in part, rev'd in part, 526 F.2d 1136 (4th Cir. 1975). Mr. Chambers has served on the Board of Governors of the University of North Carolina, the Board of Trustees of North Carolina Central University and as President and Board Member of the Southern Regional Council. He is on the Board of Trustees of the Center for Law and Social Policy, the Board of Directors of the Children's Defense Fund, the Board of

I. THE PURPOSE AND CURRENT STATUS OF AFFIRMATIVE ACTION

I will begin by attempting to explain what I mean by affirmative action. As a general matter, affirmative action is the conscious use of race, sex or national origin in an active attempt to overcome the effects of a history of discrimination. The goal of affirmative action is not to establish a permanent quota system, but rather to break the cycle of discrimination and to achieve equality which is real and not illusory. As Justice Blackmun has stated: "In order to get beyond racism, we must first take racism into account." *Regents of the University of California v. Bakke*, 438 U.S. 265, 407 (1978).

Overseers of the University of Pennsylvania School of Law, the Board of Visitors of Harvard Law School and the Board of Visitors of Columbia University School of Law.

The NAACP Legal Defense and Educational Fund, as counsel for the plaintiffs or as an amicus curiae, has long experience with the issues concerning the formulation of remedies for discrimination. *See*, *e.g.*, *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144 (1977); *United Steelworkers of America v. Weber*, 402 U.S. 43 (197(); *Fire Fighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984). In particular, LDF lawyers in conjunction with cooperating attorneys in private practice around the country have litigated hundreds of fair employment cases including many of the fair employment cases which have been litigated in the Supreme Court. *See*, *e.g.*, *Phillips v. Martin Marietta Corp*., 400 U.S. 549 (1971); *McDonnel Douglas Corp v. Green*, 411 U.S. 792 (1973); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Franks v. Bowman Transportation Company*, 424 U.S. 747 (1976); *Brown v. General Services Administration*, 425 U.S. 280 (1976); *IUE v. Robbins & Meyers*, 429 U.S. 229 (1976); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981); *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *Pullman Standard v. Swint*, 456 U.S. 276 (1982); *United States v. Aikens*, 460 U.S. 711 (1983); *Cooper v. Federal Reserve Bank*, 81 L.Ed.2d 718 (1984).

The particular affirmative action measures utilized will vary in different situations. In the school desegregation context, affirmative action may mean taking the race of students and teachers into account in making school assignments. In a broader educational context, it may mean taking race into account in admissions policies, in order to recognize the potential of disadvantaged candidates who do not possess the traditional credentials. In the voting rights area, affirmative action sometimes means taking affirmative steps to register eligible black voters and to assure that electoral systems and policies do not have a discriminatory effect on their ability to elect representatives of their choice.

In the school and employment contexts, affirmative action does not mean admitting or hiring unqualified or less meritorious candidates. However, it may mean changing our definitions of quality. Rather than abandonment of merit selection, affirmative action recognizes that we have rarely achieved that ideal. "[I]nstitutions of higher learning. . . have given conceded preferences to those possessed of athletic skills, to the children of alumni, to the affluent and to those having connections with celebrities, the famous and the powerful." Bakke, 438 U.S. at 404 (opinion of Blackmun, J.) In addition to invidious discrimination based on race or other factors, our employment system has always relied upon such non-merit-related criteria as nepotism, cronyism, and the "old boy network." Reliance on facially-neutral devices such as test scores and paper credentials also may perpetuate the effects of past discrimination without contributing to selection of a qualified workforce. Affirmative action moves us closer to a true merit system, by shifting the focus to the job-related qualifications and potential of the individual candidates, whatever their race.

Both the courts and the Congress have repeatedly approved of the use of affirmative action measures for the purpose of remedying the effects of past discrimination and segregation. These bodies have been able to put aside the emotionalism and exaggerated claims that characterize the debate over affirmative action, and to focus on the facts. And the facts reveal that well-designed and well-implemented affirmative action efforts are necessary and appropriate means of overcoming our sad history of discrimination. Federal judicial precedents upholding affirmative action are well-established in a variety of areas, including education,[2] voting rights,[3] employment rights[4] and governmental contracting.[5]

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[2] *E.g.*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Regents of the University of California v. Bakke*, 438 U.S. 265, 269 (opinion of Powell, J.), 324 (opinion of Brennan, White, Marshall & Blackmun, JJ.).

[3] *E.g.*, *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977).

[4] Every federal circuit has approved the use of affirmative remedies to remedy discrimination in employment. *See, e.g.*, *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1027-1028 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 279-81 (2d Cir.), *cert. denied*, 455 U.S. 988 (1981); *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 629 (2d Cir. 1974); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 174-177 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *Chisholm v. United States Postal Service*, 665 F.2d 482, 499 (4th Cir. 1981); *United States v. City of Alexandria*, 614 F.2d 1358, 1363-1366 (5th Cir. 1980); *United States v. I.B.E.W., Local 38*, 428 F.2d 144, 151 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); *United States v. City of Chicago*, 663 F.2d 1354, 1362 (7th Cir. 1981) (en banc); *Firefighters Institute v. City of St. Louis*, 616 F.2d 350, 364 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); *United States v. Ironworkers Local 86*, 443 F.2d 544, 553 -554 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 943-44 (10th Cir. 1979); *Palmer v. District Board of Trustees*, 748 F.2d 595 (11th Cir. 1984); *Segar v. Smith*, 738 F.2d 1249, 1293-94 (D.C. Cir. 1984); *Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982).

[5] *E.g.*, *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

Congress has, of course, consistently enacted and approved affirmative action measures. A few of the many examples include the Minority Business Set Aside program enacted by Congress, 42 U.S.C. § 6705(f)(2), and upheld by the Supreme Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the affirmative measures in the Voting Rights Act[6] and the approval of affirmative remedies for employment discrimination under Title VII of the Civil Rights Act of 1964. The intent of Congress to approve affirmative action in the employment context was made particularly clear when Title VII was comprehensively revised and extended to State and local governments in 1972, Pub. Law No. 92-261. By that time the courts had firmly stated their view that affirmative remedies are necessary in some situations to correct Title VII violations.[7] Both the House and the Senate reports cited these court decisions with approval.[8] The House Report explicitly stated: "Affirmative action is relevant not only to the enforcement of Executive Order No. 11246 but is equally essential for more effective enforcement of Title VII in remedying employment discrimination."[9] The 1972 Act also required that each department and agency of the federal government develop an affirmation action plan for employment, Pub. Law No. 92-261, Section 717, taking into account "employment opportunity needs of individual minority group populations within each geographic area."[10] The purpose of Section 717 was to make the federal government a "model employer."[11]

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[6] *See, e.g.*, Section Two of the Voting Rights Act of 1965, *as amended*, 42 U.S.C. § 1973; S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982), at 31 (under Voting Rights Act, "[t]he court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice").

[7] *See, e.g.* *United States v. United Brotherhood of Carpenters & Joiners, Local 169*, 457F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S.984 (1971); *United States v. International Bro. of Elec. Wkrs. L. No. 38*, 428 F.2d 144, 149-50 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); *Local 53, Asbestos Workers v. Volger*, 407 F.2d 1047, 1055 (5th Cir. 1969).

It is not difficult to understand why Congress and the courts have been such consistent supporters of affirmative action. In 1985 we can look back upon a history of affirmative action measures that have worked, both to bring blacks, other minorities and women into the mainstream of economic and political life, and to benefit the community as a whole. One of my favorite examples involves my hometown of Charlotte, North Carolina. I represented a group of black parents and children in their effort to obtain desegregated educational opportunities in the public schools of Charlotte.[12] After years of freedom of choice plans that did not work, the District Court ordered the school board to produce a desegregation plan that would work to eliminate the vestiges of the racially dual system. The State of North Carolina responded by enacting a statute prohibiting school districts from considering race in assigning students. In North Carolina Board of Education v. Swann,[13] the Supreme Court declared this statute unconstitutional, unanimously rejecting the contention that race may not be taken into account in devising discrimination remedies. The Court stated:

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[8] S. Rep. No. 92-415, 92nd Cong., 1st Sess. 5, n. 1 (1971); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 8 n. 1, 13 (1971).

[9] H.R. Rep. No. 92-238, supra, at 16.

[10] S. Rep. No. 92-415, supra, at 15.

[11] 118 Cong. Rec. 2298 (statement of Mr. Williams).

> "[T]e statute exploits an apparently neutral form to control school assignment plans by directing that they be 'color blind'; that requirement, against the background of segregation, would render illusory the promise of Brown v. Board of Education, 347 U.S. 483. Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.
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> Similarly, the flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in Swann, the Constitution does not compel any particular degree of racial balance or

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[12] See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1970).

[13] 402 U.S. 43 (1971).

> mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy. An absolute prohibition against use of such a device--even as a starting point--contravenes the implicit command of Green v. County School Board, 391 US 430, (1968), that all reasonable methods be available to formulate an effective remedy."[14]

Today the Charlotte-Mecklenburg County schools are a model for the nation, both in terms of educational excellence and racial desegregation. The community recognizes that desegregation has strengthened not weakened our school system. Yet, desegregation would not have occurred in the absence of the use of race-conscious pupil assignment plans.

Not long ago before the 1984 election, President Reagan visited Charlotte and in the course of a campaign speech made disparaging statements about busing to achieve desegregation. His speech prompted an editorial in the Charlotte Observer, entitled "You Were Wrong, Mr. President." The editorial stated:

> "Charlotte-Mecklenburg's proudest achievement of the past 20 years is not the city's impressive new skyline or its strong, growing economy. Its proudest achievement is its fully integrated public school system.
>
> That system was born out of a bitter controversy over court-ordered busing. It was shaped by caring citizens who refused to see their schools and their community torn apart by racial conflict. It was nourished by courageous elected officials, creative school administrators and dedicated teachers and parents. It has blossomed into one of the nation's

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[14] 402 U.S. at 45-46.

> finest, recognized throughout the United States for quality, innovation and, most of all, for overcoming the most difficult challenge American public education has ever faced.
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> * * *
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> [Y]our statement must have sent a chill through many of your supporters here, not just because of the political embarassment to you, but also because, in a second term, through your influence and the appointment Supreme Court justices, you might force this community to dismantle its integrated school system. That would be a tragedy for those who have invested so much hard work, good will and loving care in building it, and for future generations of our children."

The Charlotte Observer, October 9, 1984.

Another example of successful affirmative action comes from the police department of Detroit, Michigan. Prior to 1974, the City of Detroit experienced devastating racially-based police community tensions, caused in substantial part by years of exclusion of black public safety officers. "[W]hile the police department was discriminating against blacks in employment, a white police force was discriminating against black citizens on the street. Two massive uprisings, one in 1943 and another in 1967, resulted directly from discriminatory treatment of black citizens by white police officers."[15] Crime fighting efforts suffered from a lack of cooperation between black citizens and the police department, to the detriment of the entire community. Prior to 1974, six to eight Detroit police officers were killed in the line of duty each year.[16]

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[15] Bratton v. City of Detroit, 704 F.2d 878, 889 (6th Cir. 1983, cert. denied, 52 U.S.L.W. 3509 (Jan. 9, 1984).

The City of Detroit first tried less drastic recruiting efforts, which did not work. Finally, in 1974, the City adopted an affirmative action plan that included numerical goals for the hiring and promotion of black police officers. The improvements brought about by this plan were dramatic. "After the institution of the affirmative action program, police community relations improved substantially, crimes went down, complaints against the police department went down, and no police officers were killed in the line of duty."[17] This "led to a safer, more pleasant city for officers and citizens alike."[18]

The evidence is not limited to Charlotte and Detroit. As I will discuss in more detail in a few minutes, the Reagan Administration's Justice Department recently asked 57 local jurisdictions to modify affirmative action consent decrees to remove numerical goals and timetables. The response of the localities was overwhelmingly in favor of retaining the affirmative action requirements. For example, the State of Arkansas stated:

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[16] *Baker v. City of Detroit*, 438 F. Supp. 930, 996-97 (E.D. Mich. 1979), *aff'd*, *Bratton v. City of Detroit*, *supra* note 15.

[17] *Baker*, *supra*, 483 F. Supp. at 1000.

[18] *Baker*, *supra*, 483 F. Supp. at 1001.

> "We feel we have a fair and workable hiring procedure in place at this point, and we see no reason to alter it. The State Police has worked hard to eliminate any vestige of discrimination and will continue to work toward that end."[19]

The City of Milwaukee responded:

> "The City of Milwaukee and its various departments, boards and commissions have made unwaivering commitments to equal employment opportunity and affirmative action . . . . [T]he City will not join the Department of Justice in a motion which seeks to modify the court orders relative to hiring practices for the Milwaukee Fire Department."[20]

The State of Florida reported that it had exceeded the consent decree's hiring goals in the past two years and that "academic quality and grades of the applicants have not suffered."[21]

The City of Syracuse noted:

> "The Consent Decree currently in force protects the legitimate interests of local minority and female citizens with the least possible adverse impact on the interest and expectations of white male citizens. In doing so, it is legally permissible."[22]

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[19] Letter from Randel K. Miller, Arkansas Assistant Attorney General, to Joel Nomkin, U.S. Justice Department Attorney, dated May 16, 1985.

[20] Letter from Thomas C. Goeldner, Assistant City Attorney, to William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, dated April 18, 1985.

[21] Report to the Governor and Cabinet, Status of Florida Highway Patrol Consent Decree, at 3, attached to letter from Patricia R. Gleason, Florida Assistant Deputy Attorney General, to Loretta Connor, U.S. Justice Department Attorney, dated February 5, 1985.

[22] Letter from David M. Garber, Corporation Counsel, to John M. Gadzichowski, U.S. Justice Department Attorney, dated, March 8,

The City of Macon replied:

> "We will fight any effort to change or modify the Consent Order." [23]

The City of Indianapolis has been sued by the United States Department of Justice to compel removal of numerical hiring goals for black and female public safety officers. The City is fighting this effort in Court, and recently filed a brief stating: "There is a legitimate government concern that there be a minority and female representation in the Public Safety Department." [24] The Justice Department's proposal to terminate affirmative action efforts has also been rejected by the City of Philadelphia, [25] the City of Miami, [26] the City of Pompano Beach, Florida, [27] the City

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1985.

[23] Letter from Robert E. Steele, Jr., to Mark R. Shaffer, U.S. Justice Department attorney, dated April 15, 1985.

[24] Defendants' Memorandum in Response to the United States' Motion for Prospective Modification of Consent Decrees, dated June 3, 1985, filed in United States v. City of Indianapolis, Civ. Act. No. IP-78-388-C (S.D. Ind.)

[25] Letter from John M. Myers, Chief Deputy City Solicitor, to John Gadzichowski, U.S. Justice Department Attorney, dated January 23, 1985.

[26] Letter from Lucia A. Dougherty, City Attorney, to James S. Angus, U.S. Justice Department Attorney, dated February 21, 1985.

[27] Letter from Donald C. Roberge, City Attorney, to Richard J. Ritter, U.S. Justice Department Attorney, dated May 1, 1985.

of Chicago,[28] the City of St. Louis,[29] the City of Fort Lauderdale,[30] the State of New York,[31] and the City of Birmingham.[32]

Affirmative action also works for businesses. In a recent survey of 142 Chief Executive Offices, 122, or 95.3 percent, indicated that they intended to use numerical programs to track equal opportunity progress in their corporations regardless of government requirements.[33]

II. THE FUTURE OF AFFIRMATIVE ACTION

Given the overwhelming evidence in support of the strategy, the future of affirmative action programs should be secure. However, affirmative action has recently come under attack from a new enemy. Under the Reagan Administration, the United States

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[28] Letter from James D. Montgomery, Corporation Counsel, to Cynthia Drabek, U.S. Justice Department Attorney, dated March 22, 1985.

[29] Letter from Judith A. Ronzio, Associate City Counselor, to Gerald F. George, U.S. Justice Department Attorney, dated February 7, 1985.

[30] Letter from Dennis E. Lyles to Richard J. Ritter, U.S. Justice Department Attorney, dated May 6, 1985.

[31] Letter from Alan S. Kaufman, New York Assistant Attorney General, to Kerri Weisel, U.S. Justice Department Attorney, dated March 29, 1985.

[32] Letter from James P. Alexander to Mary E. Mann, U.S. Justice Department Attorney, dated April 8, 1985.

[33] Organization Resources Counselors, Inc., Memorandum re Final Results of CEO Survey on Numerical Measures, dated December 14, 1984.

Department of Justice is waging an aggressive, unprecedented campaign to undo the progress of the last 20 years. Ironically, the leader in this effort is the Civil Rights Division.

The Department of Justice has reversed the consistent policies of prior Republican and Democratic Administrations, and has taken the position that affirmative action is illegal under both Title VII and the Fourteenth Amendment to the Constitution.[34] According to the Justice Department, race-conscious remedies must be limited to identifiable, proven victims of discrimination.

One of the more destructive aspects of this war on affirmative action is the Justice Department's recent effort to reopen more than 50 consent decrees in order to remove affirmative action provisions. The United States is the plaintiff in these cases and has previously sought and agreed to the remedial provisions. The defendants are states, counties, cities and other local governments. As noted earlier, almost all of these State and local jurisdictions oppose termination of their affirmative action plans. The reopening of decrees in these settled cases will likely cause substantial expense for local governments, rekindle emotional issues regarding racial, ethnic and gender discrimination by local governmental agencies, and disrupt remedial programs which are working well.

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[34] The Department also has argued that affirmative action is illegal under the Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.*, *see* Memorandum of the United States in support of Motion *to* Intervene and Objections to Consent Decree, *Shimkus v. The Gersten Companies*, Civ. Act. No. C-83-2141 AJ2 (N.D. Calif.), and the State and Local Fiscal Assistance Act of 1972, *as amended*, 31 U.S.C. § 1221, *et seq.*, *see* Brief for United States, *United States v. City of Indianapolis*, Civ. Act. No. IP 78-388-C (S.D. Ind.), at 6.

The Department is attacking affirmative action on other fronts as well. The Department has filed numerous amicus briefs in the Supreme Court and the lower federal courts urging that affirmative action is unconstitutional and violative of Title VII. For example, the Department recently filed a brief in the Supreme Court arguing that "a measure cannot fairly be characterized as a remedy for a violation of equal protection unless it provides relief to an individual who was personally victimized by discrimination."[35] This position was taken in case that involves uses of affirmative measures to attract and retain minority teachers by a school system in the process of desegregating.

Similarly, the Justice Department is attempting to overturn a consent decree entered into by the State of Tennessee designed to eliminate the vestiges of discrimination in the State's system of higher education. One provision of the settlement provides a special five-year career track program for 75 black college sophomores per year, in order to increase the number of black professional students and the number of black professionals in

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[35] Brief for United States as Amicus Curiae, at 28, Wygant v. Jackson Board of Education, No. 84-1340.

Tennessee. The District Court rejected the Justice Department's attack on the decree,[36] and the Department has appealed. The Department argues that the career track program is unconstitutional because "[a] person not discriminatorily denied admission to a professional school, nor deprived of equal educational opportunities at the college level, has no 'rightful place' claim to admission vis-a-vis other applicants to that school."[37]

Minority business set aside programs also are on the Justice Department's "hit list," notwithstanding the fact that such programs have been enacted by Congress and approved by the Supreme Court. See Fullilove, supra. On May 30, 1985, William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, wrote to Department of Transportation counsel James Marquez, to express his views about the operation of the Disadvantaged Business Enterprise (DBE) Program of the Surface Transportation Assistance Act of 1962. The letter stated:

> [T]he DBE provision "has too often been misapplied to provide minority subcontractors an unfair competitive edge over non-minorities, thereby discriminating against those subcontractors not legally considered a minority."

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[36] Geier v. Alexander, 593 F. Supp. 1263, 1265-66 (M.D. Tenn. 1984).

[37] Brief for the United States, Geier v. Alexander, No. 84-6055 (6th Cir.)

Reynolds concluded:

> "[T]he Constitution precludes application of [the DBE provision] in such a race-conscious manner . . . . [T]here is no valid economic or legal basis for a racially discriminatory allocation of STAA funds."[38]

The Department's briefs filed in court also reflect this position.[39]

The Department of Justice's victim-specific approach to discrimination remedies ignores the statutory and constitutional requirement that "all vestiges" of past discrimination be eradicated, "root and branch." Keyes v. School District No. 1, 413 U.S. 189, 200 and n. 11 (1973). The purpose of a remedial decree is to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965).

Under the Justice Department's approach, the remedy for the City of Detroit's discriminatory conduct would be limited to black individuals who were denied positions in the police department prior to 1974. It is unlikely that most of these victims, who were eligible for appointment in the 1960's, 1950's, 1940's and earlier, could even be located in the 1970's and '80s.

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[38] This letter is reprinted in the Legal Times, June 24, 1985, at 4.

[39] See Brief for United States as Amicus Curiae, Britton v. South Bend Community School Corporation, No. 84-2841 (7th Cir.), at 29 n.20.

It is doubtful that many would have the desire or ability to become police officers at this late date. The Department's remedy is in effect no remedy at all.

The Department of Justice's approach certainly would have done nothing to mitigate the devastating race-based police-community tensions experienced by the City of Detroit. Yet, the facts clearly show that the entire community, particularly the black community, was the "victim" of the City's discriminatory practices in the hiring and promotion of police officers.

Similarly, it is the entire community, and particularly the black community, that suffers from the shortage of black lawyers, doctors and other professionals in the State of Tennessee. This shortage is undoubtedly a vestige of the State's prior segregation and exclusion of blacks from professional schools. Yet, the Department of Justice wants to thwart implementation of the plan to remedy this vestige. The Department objects to the plan because it is directed toward today's college sophomores, rather than toward their fathers, mothers, aunts, and uncles, who were previously excluded, but now are unlikely to be able to take advantage of the opportunity for a professional education.

If the Department of Justice wants to focus on the victims of discriminatory conduct, then it should recognize all the victims, and not just the first level victims whose applications were denied, whose schools were segregated and whose efforts to vote were met with violence and intimidation. Just as discrimination is structural, so are its results. The denial of educational and economic opportunities to the parents results in poor housing, poor schools and lower self esteem for many of the children. As a result of segregated schools, housing and other discrimination, black families today still are concentrated in identifiably black neighborhoods. Discrimination against particular black individuals diminishes the quality of life for the entire community.

The Department of Justice bases its interpretation of Title VII on mistaken views about Congress' intent and a misreading of the Supreme Court's decision in Firefighters v. Stotts, 104 S.C.t. 2576 (1984). I am certain that the members of these Subcommittees are better able to ascertain the intent of Congress than are Mr. Reynolds and the Justice Department. I previously referred to the 1972 legislative history of Title VII, which expresses that intent clearly.

The holding of the Stotts case is limited to court-imposed affirmative action plans that abrogate rights held under a bona fide seniority system. No majority of the Supreme Court has suggested, in Stotts or elsewhere, that affirmative race and gender-conscious remedies are prohibited in situations where seniority rights are not compromised. On the contrary, the majority opinion in Stotts is clearly inconsistent with the interpretation the Department of Justice wants to force upon it.[40] The underlying consent decree in *Stotts* imposed percentage hiring and promotion goals, similar to those found in the consent decree in this case. The Supreme Court nowhere suggested that the goals imposed by the underlying decree were unlawful, a view that plainly would have rendered the body of the Court's opinion superfluous.

The position of the Department of Justice rests on the highly questionable set of assumptions:

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[40] The majority opinion expressly recognized that in certain cases, a district court may award relief benefitting those who are not proven victims of discrimination:

> "Title VII precludes a district court from displacing a non-minority employee with seniority under the contractually established seniority system absent *either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy is necessary to make whole a proven victim of discrimination*."

104 S.Ct. at 2587 n. 9 (emphasis added).

- that the United States Supreme Court would decide an important and controversial issue without making it explicit that it is doing so;[41]
- that the Court would overrule an immense body of accepted decisional law, again without making its ruling explicit;[42]
- and that the Court would reach such a sweeping decision without discussing the numerous competing public policies implicated in this issue and in the array of precedential decisions.

Moreover, two of the six justices who agreed with the result in Stotts expressly stated that the race-conscious relief afforded by the layoff order could have been sustained under appropriate circumstances.[43]

The Department of Justice's re ding of Stotts ignores the distinction, commonly accepted in the law of employment discrimination, between retrospective, victim-specific "make-whole" relief and prospective, race and gender-conscious remedies. It has long been recognized that Title VII is propelled by dual purposes: "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees," *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), and "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). *See Teamsters*, *supra*, 431 U.S. at 364; *Stotts*, *supra*, 104 S.Ct. at 2593 (O'Connor J., concurring).

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[41] See Deveraux v. Geary, 596 F. Supp. 1481, 1486 (D. Mass. 1984), aff'd, No. 84-2004 (1st Cir. June 25, 1985) ("Had the Court meant to rewrite Title VII law to mean that all affirmative action programs are improper absent a finding of actual past discrimination, it would have said so here.").

[42] See cases cited in note 4 supra.

[43] See 104 S.Ct. at 2595 (Stevens J., concurring); id. at 2592 (O'Connor, J., concurring).

Not surprisingly, these dual policies have prompted courts to fashion a variety of remedies for Title VII violations, tailored to the circumstances of particular cases. Thus, the "make-whole" policy of Title VII requires that individual victims of discrimination "be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976). On the other hand, and quite apart from the "make-whole" policy of Title VII, the Courts of Appeals have unanimously recognized that in some cases, the need to eradicate the effects of widespread discrimination calls for prospective, race or gender-conscious affirmative relief.[44]

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[44] *See* cases cited in note 4 *supra*.

The Equal Employment Opportunity Commission also disagrees with the Department of Justice's assault on affirmative action. EEOC Guidelines issued in 1979 set forth the standards for appropriate use of affirmative action. 29 C.F.R. Part 1608. The EEOC recognized "the clear congressional intent to encourage voluntary affirmative action." 29 C.F.R. § 1608.1(a). The Guidelines provide that "reasonable [affirmative] action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees." 29 C.F.R. § 1608.4(c). These Guidelines remain in effect.[45]

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[45] Moreover, the Justice Department's own published Guidelines, 41 C.F.R. Part 60-3, Uniform Guidelines on Employee Selection Procedures, expressly provide that employers may use affirmative action plans which are "race, color, sex or ethnic 'conscious' . . ." and may include "[t]he establishment of a long-term goal, and short-range, interim goals and timetables for specific job classifications . . . ." Paragraph 17, Uniform Guidelines. Furthermore, the Justice Department and other Federal agencies issued in the March 2, 1979, Federal Register, a commentary on the Guidelines in the form of "Questions and Answers," *Fair Employment Practices Manual*, BNA Labor Relations Reporter, *para. 401:2301*, which expressly approve the type of affirmative action which the Department now challenges as unlawful. "The Guidelines recognize that affirmative action programs may be race, sex or ethnic conscious in appropriate circumstances . . . . A user [employer] may justifiably be race, sex or ethnic conscious in circumstances where it has reason to believe that qualified persons of specified race, sex or ethnicity have been or may be subject to the exclusionary effects of its selection procedures or other employment practices in its work force or particular jobs therein." *Id.*, Question and Answer 30.

The Justice Department is now attacking affirmative action plans which conform not only to the EEOC's regulations but also to its own Guidelines.

The Office of General Counsel of the EEOC has concluded that "the Supreme Court's decision in Stotts does not require the Commission to reconsider its established position that Title VII permits the use of prospective, race-conscious remedies where appropriate to remedy the effects of past race discrimination."[46]

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[46] Memorandum to the Commission from Office of General Counsel, dated June 20, 1984, at 7. The memorandum was sent by Chairman Clarence Thomas to Congressman Barney Frank by letter dated August 30, 1984. Chairman thomas identifies the memorandum and states: "The Office of General Counsel has concluded that the Stotts decision should not have a significant impact on the EEOC's enforcement of Title VII."

The Office stated that *Stotts* "should not have a significant impact and that the opinion would "affect only a small number of cases."[47]

The EEOC has relied upon this opinion for its post-*Stotts* submissions to courts. For example, the EEOC submitted a letter brief, July 27, 1984, to the United States Court of Appeals for the Second Circuit, in the case of *EEOC v. Local 638*, setting forth the Commission's interpretation of *Stotts*. (As discussed below, the Second Circuit adopted the EEOC's interpretation of *Stotts* and rejected an interpretation of *Stotts* comparable to the one offered by the Department.)

The federal courts also disagree with the Justice Department's position. So far, the Justice Department's attack on affirmative action has failed. I am aware of no court decision that adopts the Department's position under either Title VII or the Constitution.

The Courts of Appeals for seven federal circuits have explicitly rejected the Department's interpretation of the *Stotts* case. The Court of Appeals for the First Circuit reasoned:

> "[T]he facts and issues in *Stotts* are plainly distinguishable. Unlike the situation in *Stotts*, we are not concerned here with a district court's power, over objection of one of the parties to the decree, to

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[47] *Id.* at 4.

> order retroactive relief that the consent decree never provided. Rather, the present plaintiffs challenge provisions in the consent decree to which the original parties had voluntarily agreed. Additionally, the affirmative action ordered by the district court in *Stotts* was in direct conflict with a bona fide seniority system protected by section 703(h) of Title VII. Our case does not involve section 703(h) as there is no claimed conflict between a seniority plan and the remedies provided for in the decree.
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> A further distinction is that the parties to the *Stotts* decree had expressly disclaimed that the violations alleged in the complaint existed, whereas in this case the parties stipulated that discriminatory patterns and practices existed that were sufficient to support a Title VII action.
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> . . . . The expansive reading of *Stotts* urged by plaintiffs would require us to find that *Stotts* overruled *Weber sub silentio*. In view of the importance of any such action, it seems likely that the Court would have directly addressed *Weber* if it had intended to overrule that decision." [48]

Similarly, the Second Circuit has concluded:

> "[W]e believe that defendants' attempt to rely on *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1984), is misplaced. Defendants argue that *Stotts* eliminates all race-conscious relief except that benefitting specifically identified victims of past discrimination. We do not accept defendants' expansive interpretation of that opinion.
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> *Stotts* can be distinguished from the present case in at least three ways. First, the affirmative action ordered by the district court in that case was in direct conflict with a bona fide seniority plan that was protected

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[48] *Deveraux v. Geary*, No. 84-2004, slip op. at 13-19 (1st Cir. June 25, 1985), *affirming* 596 F. Supp. 1481 (D. Mass. 1984).

by § 703(h) of Title VII. *Id.* at 2587. In our case § 703(h) is not involved because there is no seniority plan in conflict with the remedies imposed by AAAPO or the fund order. Second, the court's discussion of § 706(g), particularly relied on by the defendants here, related only to the "make whole" relief ordered in the district court, *id.* at 2589, and did not address prospective relief like that ordered in AAAPO and the fund order. Third, in *Stotts* there was no finding of any intent to discriminate, *id.* at 2581, whereas in this case we have affirmed the district court's finding that defendants have intentionally discriminated against nonwhites."[49]

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[49] *EEOC v. Local 28*, 753 F.2d 1172, 1185-86 (1985), *pet'n for cert. filed*, 53 U.S.L.W. 3778 (April 16, 1985).

Five other appellate courts have reached the same conclusion.[50]

In the only decided case involving a Justice Department effort to re-open an old decree, the Court rejected the Department's position, noting: "The difference between Stotts and the cases pending here are so great that there should be no serious question concerning the impact of Stotts."[51]

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[50] Kromnick v. School District of Philadelphia, 739 F.2d 894, 911 (3d Cir. 1984), cert. denied, 105 S. Ct. 782 (1985) ("Unlike Stotts, there is here no override of a bona fide seniority plan and no requirement of race-conscious layoffs."); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 486 (6th Cir.) (pet'n for cert. pending) ("The fact that this case involves a consent decree and not an injunction makes the legal basis of the Stotts decision inapplicable."); Van Aken v. Young, 750 F.2d 43, 45 (6th Cir. 1984) ("The affirmative action plan involved in the instant case was not the product of any court order. It resulted from voluntary decisions in the collective bargaining process. . . . We do not read Stotts as barring this form of affirmative action."); Wygant v. Jackson Board of Education, 746 F.2d 1152 (6th Cir. 1984), cert. granted, 105 S. Ct. 2015 (Apr. 15, 1985) (Stotts does not affect affirmative action plan that "resulted from voluntary decisions in the collective bargaining process"); Grann v. City of Madison, 738 F.2d 786, 795 n. 5 (7th Cir.), cert. denied, 105 S.Ct. 296 (1984) (distinguishing Stotts on the basis that discrimination is acknowledged, the defendant agreed to the relief provided and the case did not involve seniority rights); Diaz v. American Telephone & Telegraph, 752 F.2d 1356, 1360 n. 5. (9th Cir. 1985) (Stotts "simply holds that a court may not modify a pre-existing race-conscious consent decree in such a fashion that the resulting employment practices would divest another group of employees of entitlements under a bona fide seniority system."); Turner v. Orr, 759 F.2d 823-26 (11th Cir. 1985) (limiting Stotts to court-imposed, non-voluntary actions depriving third parties of seniority rights).

The Fifth Circuit rejected the Justice Department's arguments in a pre-Stotts case in which the Department intervened for the purpose of opposing an affirmative action consent decree. Williams v. City of New Orleans, 729 F.2d 1554, 1557 (1984)(en banc).

Post-Stotts court decisions have also rejected the Department's constitutional arguments. For example, the Third Circuit upheld a faculty integration plan involving numerical goals, as a valid remedial plan under the Fourteenth Amendment.[52] The Eleventh Circuit upheld the constitutionality of a faculty hiring affirmative action plan.[53] And the District Court in the Geier case upheld Tennessee's special pre-professional career program for black college students.[54]

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[51] United States v. City of Buffalo, 37 F.E.P. Cases 1729, 1730 (W.D.N.Y. June 5, 1985). Other district decisions rejecting an expansive interpretation of Stotts include Hammon v. Barry, 37 F.E.P. Cases 609, 618-19 (D.D.C. Apr. 1, 1985) (distinguishing Stotts on ground that pending case involved voluntary plan that did not abrogate seniority rights); Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Department, 37 F.E.P. Cases 1569, 1570-71 (D. Mass. May 28, 1985) ("The holding of Stotts cannot be extended beyond its rather narrow fact pattern."); Britton v. South Bend Community Corp., 593 F. Supp. 1223, 1230-31 (N.D. Ind. 1984), appeal pending, No. 84-2841 (7th Cir.) (Stotts does not apply to voluntary affirmative action plan); DPOA v. City of Detroit, 36 F.E.P. Cases 1019, 1024-25 (E.D. MI 1984) (Stotts does not apply to voluntary affirmative action programs); NAACP v. Detroit Police Officers Ass'n, 591 F. Supp. 1194, 1202-03 (E.D. Mich. 1984) (Stotts does not apply where there was past intentional discrimination); Vulcan Pioneers v. New Jersey Civil Service, Civ. Act. Nos. 950-73, 77-2054, 79-184, unpublished opinion, at 4, n. 1 (D.N.J. July 20, 1984) (limiting Stotts to deprivations of seniority rights).

[52] Kromnick, supra note 46, 739 F.2d at 900-909. The Sixth Circuit upheld a minority faculty retention program in Wygant, supra note 46, 746 F.2d at 1155-57, against a Fourteenth Amendment challenge.

[53] Palmer v. District Board of Trustees, 748 F.2d 595 (1984).

[54] Geier, supra note 36, 593 F. Supp. at 1264-87. Other post-Stotts

Although the Department of Justice is losing in the courts, its highly visible assault on affirmative action undermines the effort to achieve racial justice. Employers' commitments to effective affirmative action are weakened by the prospect of defending reverse discrimination lawsuits brought by the Department. Employers are confused when government enforcement agencies take opposite positions on the legality of affirmative action.

The Department's legal maneuvers are also directed at the press and the public. Using "horror stories," distorted facts and exaggerated claims about the effect of affirmative action on white males, the Department is waging a propaganda war against affirmative action.

Conclusion

As members of these influential committees and subcommittees, you are in a position to counteract the harm being done by the Department of Justice. I encourage you to monitor the activities of the Justice Department closely, as you are now doing through these hearings. I urge you to use your oversight and other legislative powers to put a stop to the most offensive

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cases upholding affirmative action under the Fourteenth Amendment include Deveraux, supra note 48, slip op. at 17 n. 5; Vanguards of Cleveland, supra note 50, 753 F.2d at 484 n. 1; Hammond v. Barry, supra note 51, 37 F.E.P. Cases at 619-20; Britton, supra note 51 , 593 F. Supp. at 1229-30; NAACP v. DPOA, supra note 51, 591 F. Supp. at 1199-1202; DPOA v. Young, supra note 51, 36 F.E.P Cases 1023-24.

tactics. In particular, the NAACP Legal Defense and Educational Fund, Inc., and other civil rights groups have asked Congress to place a rider on the Justice Department authorization bill which would limit the expenditure of funds to reopen judicial decrees to remove affirmative action provisions.[55]

The Committees can also use their influence to ensure that adherence to affirmative action principles is maintained in the Department of Labor and the Equal Employment Opportunity Commission. Secretary Block at the Labor Department has stated that affirmative action is here to stay. He needs Congressional reinforcement and support. And, through committee reports, interviews and speeches, members of Congress can put the real facts about affirmative action before the public. By informing your constituents and the press about the successes of affirmative action, in places like Charlotte and Detroit, you can help expose the Justice Department's half-truths and exaggerations.

Finally, I urge you to use your influence in your respective political parties. Both the Democratic and the Republican political parties have given strong support to affirmative action and racial justice over the past decades. I encourage the Democrats, and particularly the Republicans here today, to fight to maintain their parties' commitment to these principles.

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[55] This rider is discussed in more detail in the Statement of Barry Goldstein, Assistant Counsel, NAACP Legal Defense and Educational Fund, Inc., Before the Subcommittee on Civil and Constitutional Rights, on April 16, 1985.

Mr. EDWARDS. Thank you, Mr. Chambers.

Now we'll hear from Professor Elizabeth Bartholet from Harvard Law School.

Ms. BARTHOLET. Thank you, Mr. Edwards, Mr. Martinez, and members of the subcommittees. Thank you for the opportunity to testify in these important hearings.

I did submit a written statement and appreciate that it will be made part of the record.

I do teach at Harvard Law School and have taught and written in the area of employment discrimination for the past 8 years.

I want to focus my comments today on the radical nature of the assault by some members in this administration on affirmative action. The assault represents, in the first place, a radical notion as to the appropriate use of this Government's civil rights enforcement resources.

Whatever the rights and wrongs of the administration's theories as to the law on affirmative action, it is shocking to see the Civil Rights Division of the Justice Department and officials of the U.S. Civil Rights Commission and the Equal Employment Opportunity Commission devoting their primary efforts to protecting white males from discrimination.

It is similarly shocking to hear, as I heard some weeks ago from a lawyer opposing the Justice Department in one of the post-*Stotts* cases, that the Department in that case had been devoting its energies to proving on a case-by-case basis that individual black employees who were the beneficiaries of a court-ordered remedy were less qualified to perform their jobs than individual white employees.

The administration's assault is, second, radical in principle. The administration's operative principle is that all race-conscious, group-oriented action designed to provide minorities with jobs or other concrete benefits, as opposed to the kind of affirmative action recruitment that defines affirmative action for Mr. Reynolds, is morally, legally, and constitutionally wrong because it would constitute unlawful discrimination against whites.

The underlying notion is that laws and constitutional provisions barring discrimination, such as title VII of the 1964 Civil Rights Act and the 14th amendment to the Constitution, must be read in an entirely race-neutral way.

I call this principle radical because it flies in the face of the reality that title VII and the 14th amendment were passed primarily in order to deal with problems of discrimination against victimized minorities and not to deal either with random, arbitrary discrimination or with problems of invidious discrimination against white males.

While race-conscious, group-oriented action has always been controversial, the principle that such action can and, on occasion, must be taken in order to deal with this Nation's race problem has received increasing acceptance over the past decades.

The assault is, third, designed to be radical in effect. It would destroy the two things that have proven most effective in the battle against race discrimination in the workplace during the last two decades.

Thus it would, in the first place, destroy the affirmative action programs that have become a major part of our society's efforts to integrate the workplace, programs such as those mandated by Executive Order 11246.

I found it curious to read in Mr. Reynolds' written statement, his statement that the Justice Department's experience is that the kind of recruitment he is talking about and the kind of rightful place affirmative action theory works. Their experience that this works is something that I would like to see documented, because certainly the literature on what has worked in the area of employment discrimination during the last two decades demonstrates that what has worked is the kind of affirmative action programs that Mr. Reynolds is in the process of trying to dismantle.

Moreover, and more fundamental even than this, is the fact that a successful assault would be radical, in effect, because it would almost inevitably lead, I believe, to the demise of the disparate impact or Griggs doctrine, thus drastically narrowing the range of conduct traditionally condemned as discriminatory under Title VII.

The Griggs doctrine has been absolutely key to the significance of Title VII as a tool for change, but it is a doctrine that cannot continue to exist without the breathing space that employer ability to engage in affirmative action provides.

Thus, if the administration is successful, we would be left with a Title VII that had been gutted of much real meaning in today's world. Title VII would ban intentional discrimination, but intentional discrimination in provable form is hardly the major problem that blacks face in today's work world. Proven victims of such discrimination would be able to obtain relief, but such victims will be few in number, and the relative handful of jobs and promotions that they might obtain in the name of relief will do little to affect patterns of segregation in the workplace.

Again, to go back to one of Mr. Reynolds' points, his notion that affirmative action recruitment, even if engaged in, under his theory, will accomplish anything flies, again, in the face of reality that, if there is recruitment, for example, in the future for civil service jobs in police departments, fire departments, correction departments, what those blacks who were affirmatively recruited are going to face is the very kind of civil service exams that, in the past, have grossly disproportionately excluded them from employment.

If the Griggs document dies along with affirmative action, recruitment is going to do those blacks no good when they bump into those exclusionary exams.

I want to make a couple of final points briefly related to the urgency of Congress taking some kind of action now to reaffirm traditional doctrines of law with respect both to discrimination and to affirmative action.

Mr. Edwards. Professor Bartholet, I regret that we have another vote, and we must recess for about 10 minutes.

[Recess.]

Mr. Edwards. The subcommittees will come to order.

Professor, you may proceed.

Ms. Bartholet. Thank you.

I wanted just to make a couple of brief, final points related to the urgency of Congress taking whatever action it can now to reaffirm traditional doctrines of law with respect both to discrimination and affirmative action.

First, the administration is taking steps not just to dismantle programs but to change the law through the courts that could well tie Congress' hands in the future.

Before the Supreme Court rules on whether all affirmative action and, by implication, whether Griggs' doctrine is outlawed, at least where State action and the Constitution are involved, it seems to me that the Court should know where Congress stands on that issue.

Second, it is important to realize that the administration's assault has already undoubtedly had a very significant effect on the attitudes of public and private employers and of others in a position either to promote or to inhibit minority advancement in the workplace.

Unless they are checked now, the administration's efforts, whether ultimately successful or not in terms of rewriting laws, regulations, and constitutional history, threaten significant damage to the progress that has been made in the workplace during the last several decades.

Employers and others have gradually been brought to the point where they have developed significant programs promoting integration in the workplace. This progress is the result of years of efforts to educate them as to the meaning of the antidiscrimination principle and to reward them for the development of affirmative action actions.

Administration claims that all race-conscious employer conduct designed to benefit minorities must be seen as unlawful discrimination put employers in an intolerable position. All that they have learned to date tells them that the legally safe and the morally right course is that which would promote the advancement of minorities in the workplace. Yet the Federal Government now states that such action constitutes unlawful discrimination against whites, subjecting employers to the risk of suit both by the Government and by their white employees.

The current situation provides employers with a very strong incentive to bring to a grinding halt all moves to develop affirmative action programs and, indeed, an incentive to dismantle such programs as exist.

The need for your subcommittees to recommend what action you can to counter the Administration's assault is, therefore, most urgent.

Thank you.

[The statement of Ms. Bartholet follows:]

Summary of
Testimony of Elizabeth Bartholet
Professor of Law, Harvard Law School
Regarding Affirmative Action
before
The Subcommittee on Civil and Constitutional Rights
and
The Subcommittee on Employment Opportunities
of the
U.S. House of Representatives'
Committee on the Judiciary and
on Education and Labor

July 11, 1985

Thank you for the opportunity to testify in these important oversight hearings on affirmative action.

My name is Elizabeth Bartholet. I am a Professor of Law at Harvard Law School, where I have taught a number of employment discrimination courses, and have written articles on the nature and significance of the basic doctrines that have been developed by Congress and the courts to give meaning to the law's ban on discrimination in employment. Before coming to Harvard I practiced law for a number of years, specializing to a significant degree in the employment discrimination area.

I want to focus my comments today on the radical nature of the assault by some officials in this Administration on affirmative action in the employment area.

The Administration's assault is based on the principle that race-conscious, group-oriented action, designed to provide minorities with jobs or other concrete benefits, is morally, legally and constitutionally wrong because it would constitute unlawful discrimination against whites. Minorities can be provided benefits only if they can demonstrate that as individuals they are victims of prior unlawful discrimination; the benefits then can be justified as relief for such discrimination. The underlying notion is that laws and constitutional provisions barring discrimination, such as Title VII of the 1964 Civil Rights Act and the Fourteenth Amendment to the U.S. Constitution, must be read in an entirely race-neutral way.

This principle is radical in its own right. No one can honestly fail to recognize that Title VII and the Fourteenth Amendment were passed primarily in order to deal with problems of discrimination against victimized minorities, and not to deal either with random arbitrary discrimination, or with problems of invidious discrimination against white males. And while race-conscious, group-oriented action has always been controversial, the principle that such action can and on occasion must be taken in order to deal with this nation's race problem has received increasing acceptance over the past decades.

The assault, if successful, would also be radical in effect, destroying the affirmative action programs that have become a major part of our society's efforts to integrate the workplace. Moreover, and even more fundamental, a successful assault would almost inevitably lead to the demise of the disparate impact or *Griggs* doctrine, thus drastically narrowing the range of conduct traditionally condemned as discriminatory under Title VII.

We would thus be left with a Title VII that had been gutted of much real meaning in today's world. Title VII would ban intentional discrimination, but intentional discrimination in provable form is hardly the major problem that blacks face in today's workworld. Proven victims of such discrimination would be able to obtain relief, but such victims will be few in number, and the relative handful of jobs and promotions that they might obtain in the name of relief will do little to affect patterns of segregation in the workplace.

Finally, it is important to realize that the assault has *already* undoubtedly had a significant effect on the attitudes of public and private employers, and of others in a position either to promote or to inhibit minority advancement in the workplace. Unless they are checked now, the Administration's efforts -- *whether ultimately successful or not* in terms of rewriting laws, regulations and constitutional history -- threaten significant damage to the progress that has been made in the workplace during the last several decades. Employers and others have gradually been brought to the point where they have developed significant programs promoting integration in the workplace. This progress is the result of years of efforts to educate them as to the meaning of the anti-discrimination principle, and to reward them for the development of affirmative action programs. Administration claims that all race-conscious employer conduct designed to benefit minorities must be seen as unlawful discrimination puts employers in an intolerable position. All that they have learned to date tells them that the legally safe and the morally right course is that which would promote the advancement of minorities in the workplace. Yet the federal government now states that such action constitutes unlawful discrimination against whites, subjecting employers to the risk of suit by the government and by their white employees. The current situation provides employers with a very strong incentive to bring to a grinding halt all moves to develop affirmative action programs and, indeed, an incentive to dismantle such programs as exist.

The need for your Subcommittees to recommend what action you can to counter the Administration's assault is, therefore, most urgent.

STATEMENT
of
ELIZABETH BARTHOLET
Professor of Law, Harvard Law School
Regarding Affirmative Action

Before

The Subcommittee on Civil andConstitutional Rights
and
The Subcommittee on Employment Opportunities

of the
U.S. House of Representatives'
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on Education and Labor

July 11, 1985

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To the Chairs and members of the subcommittees:

Introduction

Thank you for the opportunity to testify in these important oversight hearings on affirmative action.

My name is Elizabeth Bartholet. I am a Professor of Law at Harvard Law School, where I have taught a number of employment discrimination courses, and have written articles on the nature and significance of the basic doctrines that have been developed by Congress and the courts to give meaning to the law's ban on discrimination in employment.[1] Before coming to Harvard I practiced law for a number of years, specializing to a significant degree in the employment discrimination area.

I want to focus my comments today on the radical nature of the assault by some officials in this Administration on affirmative action in the employment area.[2].

The assault represents, in the first place, a radical notion as to the appropriate use of this government's civil rights enforcement resources. Whatever the rights and wrongs of the Administration's position on affirmative action, it is shocking to see the Civil Rights Division of the Justice Department, and officials of the U.S.Civil Rights Commission and the Equal Employment Opportunity Commission, devoting their primary efforts to protecting white males from discrimination. It is similarly shocking to hear, as I heard some weeks ago from a lawyer opposing the Justice Department in one of the post-Stotts cases, that the Department in that case has been devoting its energies to proving, on a case by case basis, that individual black employees who were the beneficiaries of a court-ordered remedy, are less qualified to perform their jobs than individual white employees.

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[1] See Bartholet, Applications of Title VII to Jobs in High Places, 95 Harv. Law Rev. 945 (1982); Bartholet, Proof of Discriminatory Intent Under Title VII: United States Postal Service Board of Governors v. Aikens, 70 Calif. Law Rev. 5 (1982).

[2] While I will limit myself to dealing with the employment area, where the Administration's efforts have thus far been concentrated, it is clear that the implications of this assault, if successful, would be far-ranging. Indeed the Justice Department has already indicated that it considers affirmative action remedies improper in the areas of housing and school discrimination.

The Administration's assault is based on the principle that race-conscious, group-oriented action, designed to provide minorities with jobs or other concrete benefits,[3] is morally, legally and constitutionally wrong because it would constitute unlawful discrimination against Whites. Minorities can be provided benefits only if they can demonstrate that as individuals they are victims of prior unlawful discrimination; the benefits then can be justified as relief for such discrimination. The underlying notion is that laws and constitutional provisions barring discrimination, such as Title VII of the 1964 Civil Rights Act and the Fourteenth Amendment to the U.S. Constitution, must be read in an entirely race-neutral way.[4]

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[3] The only kind of affirmative action such a principle would allow is a limited kind of outreach -- recruitment efforts directed toward black job candidates, for example.

This principle is radical in its own right. No one can honestly fail to recognize that Title VII and the Fourteenth Amendment were passed primarily in order to deal with problems of discrimination against victimized minorities, and _not_ to deal either with random arbitrary discrimination, or with problems of invidious discrimination against white males. And while race-conscious, group-oriented action has always been controversial, the principle that such action can and on occasion must be taken in order to deal with this nation's race problem has received increasing acceptance over the past decades.

The assault, if successful, would also be radical in effect, destroying the affirmative action programs that have become a major part of our society's efforts to integrate the workplace. Moreover, and even more fundamental, a _successful_ assault would almost inevitably lead to the demise of the disparate impact or Griggs doctrine, thus drastically narrowing the range of conduct traditionally condemned as discriminatory under Title VII.

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[4] The Justice Department's amicus curiae brief submitted recently in the _Wygant_ case sets forth this position in some detail with respect to the federal _constitutionality_ of affirmative action. See Brief for the United States as Amicus Curiae in _Wygant v. Jackson Board of Educ._, U.S. Sup. Ct. Oct. Term, 1984, No 84-1340. The Chairman of the E.E.O.C. has recently indicated that in his view Title VII similarly prohibits all affirmative action.

We would thus be left with a Title VII that had been gutted of much real meaning in today's world. Title VII would ban intentional discrimination, but intentional discrimination in provable form is hardly the major problem that blacks face in today's workworld. Proven victims of such discrimination would be able to obtain relief, but such victims will be few in number, and the relative handful of jobs and promotions that they might obtain in the name of relief will do little to affect patterns of segregation in the workplace.

Finally, it is important to realize that the assault has already undoubtedly had a significant effect on the attitudes of public and private employers, and of others in a position either to promote or to inhibit minority advancement in the workplace. Unless they are checked now, the Administration's efforts -- whether ultimately successful or not in terms of rewriting laws, regulations and constitutional history -- threaten significant damage to the progress that has been made in the workplace during the last several decades. Employers and others have gradually been brought to the point where they have developed significant programs promoting integration in the workplace.

This progress is the result of years of efforts to educate them as to the meaning of the anti-discrimination principle, and to reward them for the development of affirmative action programs. Administration claims that all race-conscious employer conduct designed to benefit minorities must be seen as unlawful discrimination puts employers in an intolerable position. All that they have learned to date tells them that the legally safe and the morally right course is that which would promote the advancement of minorities in the workplace. Yet the federal government now states that such action constitutes unlawful discrimination against whites, subjecting employers to the risk of suit by the government and by their white employees. The current situation provides employers with a very strong incentive to bring to a grinding halt all moves to develop affirmative action programs and, indeed, an incentive to dismantle such programs as exist.

The need for your Subcommittees to recommend what action you can to counter the Administration's assault is, therefore, most urgent.

Affirmative Action Programs

I will be relatively brief in discussing the significance of Administration attacks on affirmative action programs, since I assume that others will focus primary attention on this issue.

Such programs, using numerical quotas and goals as a means of promoting racial integration of the workforce, have long been seen as key to accomplishing real change. Thus one of the first major federal initiatives in the employment discrimination area was Executive Order 11246,[5] issued by President Johnson in 1965 and still in force as amended. This order, requiring government contractors to develop affirmative action programs, has proven one of the most effective devices in promoting integration of the workplace.[6] Similarly, courts faced with egregious patterns of racial exclusion from the workforce have turned to affirmative action remedies as the most effective means for moving toward an integrated workforce. And public and private employers, together with unions, who have determined to do something to promote minority advancement in the workplace, whether to avoid legal liability or for other reasons, have turned increasingly to affirmative action programs. Again, while the evidence is difficult to unravel, careful students of the changes that have taken place for blacks in the workplace over the last couple of decades, believe that the affirmative action pressures created by the potential for Title VII liability, together with E.O. 11246, have been largely responsible for the substantial progress that has occurred.[7]

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[5] Exec. Order No. 11246, 3 C.F.R. 339 (1964-64 comp.), reprinted in 42 U.S.C. 2000e (1982).

[6] Thus serious analysts of the causes of such progress as blacks have made in the workplace in the past two decades, have given E.O. 11246 primary credit. See. e.g., Freeman, Affirmative Action: Good, Bad or Irrelevant? New Perspectives (U.S. Commission Civil Rights, Fall 1984) 23, 25; Leonard, Splitting Blacks?: Affirmative Action and Earnings Inequality Within and Across Races., Working Paper No. 1327, National Bureau of Economic Research, April 1984; Leonard, The Impact of Affirmative Action (Berkeley: School of Business Administration, University of California, 1983); Office of Federal Contract Compliance , Employment Patterns of Minorities and Women in Federal Contractor and Noncontractor Establishments, 1974-1980 (Washington, D.C.: U.S. Department of Labor, June 1984).; Oster and Juba, Assessing the Need for Affirmative Action: Race and Sex Inequality among Federal Contractors (Policy Analysis, Inc., January 1984); Smith and Welch, Affirmative Action and Labor Markets, 2 J. Labor Econ. 269, 280-83 (1984); Fallon and Weiler, Fire Fighters v. Stotts: Conflicting Models of Racial Justice, 1984 Supreme Court Review 1 at 11-12, n.47.

Such programs have been endorsed by the courts as lawful and constitutional, so long as they satisfied a basic rule of reason -- so long as they did not unduly trammel the rights of whites, and so long as the program had been responsibly designed by an appropriate body.[8] Thus far at least, the Supreme Court has only balked at affirmative action in the employment area where it would affect the vested seniority rights of white workers.[9]

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[7] See Blumrosen*Expanding the Concept of Affirmative Action to Address Contemporary Conditions*, 13 N.Y.U. Rev. of Law and Social Change, 297, 297-300 (1984-85); Fallon and Weiler, *supra* n. 6, at 52-53 and at 11-12, n. 47.

[8] See, *e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448 (1980); United Steelworkers v. Weber, 443 U.S. 193 (1979); *Regents of The University of California v. Bakke*, 438 U.S. 265 (1978); *Contractors Ass'n. v. Secretary of Labor*, 442 F. 2d 159 (3rd Cir. 1971).

[9] See *Firefighters Local Union No. 1784 v. Stotts*, No. 82-206, 104 S. Ct. 2575 (June 12, 1984). In *Stotts* four members of the court indicate in dictum some doubt as to whether any court-ordered affirmative action remedies are legitimate under Title VII.

All such affirmative action programs are, of course, now subject to attack by those leading the Administration's assault. The assault in *principle* would be opposed to all, since all provide for race-conscious, group-oriented job preferences. All can be characterized, in the Administration's vocabulary, as reverse discrimination -- discrimination against whites. The Justice Department has thus far focused its energies on attacking public employer affirmative action programs,[10] and in attacking all court-ordered affirmative action remedies.[11] And the Justice Department seems to recognize that for now the Supreme Court's decisions in *Fullilove* and *Weber* require that Congress and that private employers be allowed to engage in some form of affirmative action. But the Department argues for an absurdly narrow interpretation of these cases, contending in its recent brief, in the *Wygant* case, pending in the U.S. Supreme Court, that *Fullilove* stands for a principle that goes not far beyond the notion that identified victims of discrimination can receive remedies for harms that they have suffered.[12] Moreover it is clear that other key programs, such as those promoted by E.O. 11246, and governmental regulations mandating or encouraging affirmative action, are up for grabs in this Administration.[13]

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[10] See, e.g., Brief for the United States as Amicus Curiae in *Wygant v. Jackson Board of Education*, U.S. Sup. Ct. Oct. Term 1984, No. 84-1340.

[11] The Justice Department has undertaken a review of all public employer cases in which it was involved, to seek modification of all litigated and all consent decrees to ensure that relief was provided only to proven victims of prior unlawful discrimination. For an example of the Department's position see, e.g., United States' Memorandum of Points and Authorities in *Hammon v. Barry etc.*, civil action nos. 84-0903, 85-0782, 85-0797 (D.D.C.) pp. 12-13, 30-42.

Disparate Impact Doctrine

As discussed above, the assault on affirmative action is designed to eliminate all programs that go beyond providing remedies for identified victims of discrimination. But this assault, if successful, would not stop at simply eliminating such programs. It would inevitably radically change the definition of discrimination that Congress and the courts have developed under Title VII. It would narrow that definition in a way that would limit drastically the number of victims that could ever be demonstrated to have suffered discrimination so as to be entitled to remedies. And it would narrow the definition in a way that would permit employers to use selection and promotion procedures that would screen minorities out of the workplace. In short, it would eliminate or drastically limit the disparate impact or Griggs doctrine that has been key to the effectiveness of Title VII.

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[12] See, e.g., Brief for the United States as Amicus Curiae in Wygant, supra n. 10 , at 30 and related footnote; see also United States, Memorandum supra n. 11 , at 25-30, arguing for a narrow interpretation of Weber.

[13] Thus the Chairman of the E.E.O.C. has made clear his hostility to federal agency efforts and regulations designed to encourage affirmative action, on the basis of the general principle that such efforts constitute anti-white discrimination.

Courts and commentators realized early in Title VII's history that disparate impact doctrine was essential if Title VII was to have any significant effect on the problems of segregation in the workplace that had inspired its passage. They realized that once the most blatant overt discriminatory barriers had been removed, it was "neutral" employer practices such as the use of educational degree and testing requirements that posed the major barriers to black advancement in employment. And they developed the concept that discrimination should be interpreted to cover the use of such neutral practices when they had an adverse impact on blacks that could not be justified on the grounds of "business necessity" or "job relatedness."[14]

Disparate impact doctrine was hardly revolutionary in concept. It was known that many of the tests and other selection devices commonly used by employers had limited utility in selecting the most meritorious employees. It was also known that blacks, by virtue of educational and other discrimination would do worse than whites on testing and educational degree requirements. It took no great conceptual leap to decide that employer insistence on using such devices with their predictable adverse impact on blacks, constituted a prima facie case of unlawful discrimination. It seemed no great invasion of employer prerogatives to insist that employers either use selection devices that avoided adverse impact, or that they demonstrate the job-relatedness of any devices that produced adverse impact. And so the disparate impact doctrine was developed by the lower federal courts relatively soon after the passage of Title VII,[15] endorsed by a unanimous Supreme Court in 1971 in Griggs v. Duke Power Co.,[16] and endorsed by Congress as reflected in the legislative history of the 1972 Amendment to Title VII.[17]

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[14] See generally Cooper and Sobel, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (1969).

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[15] See cases cited in Cooper and Sobel, *supra* n. 14.

[16] 401 U.S. 424 (1971).

[17] Thus the House Committee on Education and Labor Report in connection with the 1972 amendment to Title VII states:

> Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problems in terms of "systems" and "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements. The forms and incidents of discrimination which the Commission is required to treat are increasingly complex. Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance. A recent striking example was provided by the U.S. Supreme Court in its decision in Griggs v. Duke Power Co., _____ U.S. _____, 91 S.Ct. 849, 3 FEP Cases 175 (S.Ct. 1971), where the Court held that the use of employment tests as determinants of an applicant's job qualification, even when

Disparate impact doctrine has, as predicted, proven key to the effectiveness of Title VII. Literally masses of employer practices that had functioned as barriers to black advancement in the workplace have been struck down as unlawful by the courts.[18] Moreover this litigation helped to demonstrate that there *was* in fact no legitimate business justification for many common employer practices. Employers lost most of these cases *not* because they were subjected to an impossible burden of proof under the *Griggs* doctrine, but because, once courts looked at the evidence, they had to see

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> nondiscriminatory and applied in good faith by the employer, was in violation of Title VII if such tests work a discriminatory effect in hiring patterns and there is no showing of an overriding business necessity for the use of such criteria.

H.R. Rep. No 92-238, 92nd Cong. 1st Sess. at 8 (1971).

The Senate Report included similar language. S. Rep. No. 92-415, 92nd Cong., 1st Sess. at 5 (1971). In addition it provided that:

> Civil Service selection and promotion techniques and requirements are replete with artificial requirements that place a premium on 'paper' credentials. Similar requirements in the private sectors of business have often proven of questionable value in predicting job performance and have often resulted in perpetuating existing patterns of discrimination (see e.g., *Griggs v. Duke Power Co.*. ...). The inevitable consequence of this kind of a technique in Federal employment, as it has been in the private sector, is that classes of persons who are socio-economically or educationally disadvanted suffer a heavy burden in trying to meet such artificial qualifications. Id.

[18] See generally Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv.L.Rev. 945, 950-55 (1981).

that there was not enough that could be said in defense of these systems to justify their racially exclusionary effect.[19]

Disparate impact doctrine is especially important today. In the first place, employers are simply not likely to engage in intentional discrimination, in any provable form,[20] twenty years after the passage of an Act that forbids such discrimination, and that provides for back pay and attorneys' fees. More important, most of the barriers to black advancement are caused by practices that would never be perceived or characterized by courts as intentional discrimination. Often the problem is that employers simply prefer to use systems that they have traditionally used. Most of these systems -- designed by a white male workworld -- suit the needs of and serve to benefit white male employees and applicants at the expense of blacks. Most employers do not continue to use such systems because they harbor feelings of invidious discrimination in their hearts.

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[19] Id. at 947-48, 957-59, 989-98. A major thesis of this article is that the history of Title VII litigation demonstrates the irrationalility of many of the employer practices challenged under disparate impact doctrine.

[20] The Supreme Court has established burdens of proof doctrine which makes an intentional discrimination case extremely difficult for plaintiffs to prove. See Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (holding that plaintiff retains burden of proof as to ultimate issue of intent, and that defendant's only burden is to produce evidence articulating -- not proving -- a nondiscriminatory explanation for any differential treatment of blacks as compared to whites).

But many if not most will not change their ways unless compelled to. Disparate impact doctrine compels them to at least consider the necessity of continuing to use racially exclusionary systems.

There have been threats from the early days of this Administration that efforts would be made to eliminate the disparate impact doctrine. Recently the Chairman of the E.E.O.C. has stepped up the attack, arguing that disparate impact doctrine constitutes a form of reverse discrimination, and that Title VII should be read to prohibit only intentional forms of discrimination. He has accordingly called, for example, for revision of the Uniform Guidelines on Employee Selection Procedures[21] -- guidelines that currently endorse disparate impact doctrine, and give guidance to the courts in applying it to concrete situations. The assault on affirmative action signals that more can be expected along these lines.

In any event, this assault, if successful, will necessarily eliminate the Griggs doctrine as we know it today. This is because the Griggs doctrine requires that employers act in a race-conscious, group-oriented manner. They must, first, keep careful track of the racial impact of their employment procedures in order to determine if these procedures are arguably in violation of law. They must, second, take action whenever they discover that their procedures have had an adverse impact on a group protected by the doctrine. And finally and most important, for the *Griggs* doctrine to make any sense from a social and economic policy viewpoint, employers must be free to take *either* of two different kinds of actions at this point. They must, on the one hand, be free to validate their procedures. *And* they must be free, in the alternative, simply to eliminate the adverse impact of their procedures. The policy reason that employers must have this choice is that validation will simply not always make any business or economic sense. The legal reason is that if the employer eliminates adverse impact, there is no basis in discrimination law for insisting upon validation.

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[21] 29 at C.F.R.§§ 1607.1 to .18 (1980)(first published at 43 Fed. Reg. 38, 290 (1978).

The *Griggs* doctrine has in fact provided employers with this choice from the beginning, and many have recognized that it has, as a result, provided significant pressure on employers to develop affirmative action programs.[22] The flip side of this point is that employers *must* be allowed to engage in affirmative action programs so long as the *Griggs* doctrine is to survive. The Supreme Court recognized this reality in the *Weber* case.[23] The Court there held that private employers could voluntarily engage in affirmative action programs in part, it seems clear, because the Court recognized that employers *had* to have this freedom so long as they were subject to *Griggs* liability.[24]

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[22] See Bartholet, supra n 1., at 954 and n. 24, and see authorities there cited.

[23] *United Steel Workers v. Weber,* 443 U.S. 193 (1979),

In *Weber* the court approved a broad affirmative action program, designed to achieve goals beyond those that might be seen as remedying the employer's "arguable violation" of law, as the concurring opinion points out.[25] But this kind of broad affirmative action response *must* be permitted, if employers are not to be caught in some no man's land between the risk of suits by blacks on the one hand and whites on the other. Decisions as to the exact parameters of the violation and the injured group rest on too many hard-to-calculate factors in today's world of complex Title VII litigation, to tell an employer that it can avoid a *Griggs* suit by correcting for the arguable violation, but must limit its affirmative action program so that it goes no further than this remedial principle would allow. Moreover, employers would be understandably reluctant to justify any affirmative action plan on an arguable violation rationale, for fear of subjecting themselves to backpay liability to the class whose rights were arguably violated.

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[24] See Justice Blackmun's concurring opinion:

> In his dissent from the decision of the United States Court of Appeals for the Fifth Circuit, Judge Wisdom pointed out that this case arises from a practical problem in the administration of Title VII. The broad prohibition against discrimination places the employer and the union on what he accurately decribed as a "high tightrope without a net beneath them." 563 F.2d, 230, 16 FEP Cases 1, 12. If Title VII is read literally, on the one hand they face liability for past discrimination against blacks and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

443 U.S. at 209, 216.

[25] 443 U.S. at 209.

In any event, the principle espoused by those leading the assault on affirmative action would outlaw *all* race-conscious, group-oriented employer efforts that go beyond providing remedies to individual identified victims. This principle would not only prevent employers from initiating *Weber*-style affirmative action programs, but also would prohibit a wide variety of other steps employers might otherwise want to take to eliminate adverse impact, as a means of avoiding *Griggs* liability. Since it makes little sense to force employers to strictly validate all devices that have an adverse impact, it seems inevitable that the Administration's principle would at the very least lead to a softening of the *Griggs* doctrtrine,by massively reducing the burden on employers to justify their systems. Thus employers might be asked simply to produce legitimate business justifications for their practices. But this soft standard is the very standard that was rejected in *Griggs*, and it would entirely gut the *Griggs* doctrine.[26]

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[26] See Bartholet, *supra* n. 1, at 953.

Alternatively the disparate impact doctrine could be jettisoned altogether.[27]

The recent Bushey case, in which three members of the Supreme Court dissented from a denial of certiorari,[28] provides a good illustration of the essential linkage between Griggs doctrine and affirmative action. In Bushey the Second Circuit upheld action taken by New York State to eliminate the adverse impact of a test that had been given for the position of "Correction Captain" in the State prison system. The State had been subject to two previous successful suits challenging tests for two other correctional positions. It had no evidence as to the validity of the captain's test. It did have evidence that blacks were performing comparably with whites in the positions below that of captain. The State decided to adjust the scores of blacks on its captain's test to make them comparable to the white scores, thus eliminating the test's adverse impact. Upon challenge by white candidates, the Second Circuit held that the State was justified in its actions, and that it would make no sense to instead require that it wait to be sued, or that it try to validate its test. The three dissenting Justices in the Supreme Court hinted that they would likely agree with a position that sounds frighteningly like the Justice Department's recent briefs attacking public employers' affirmative action programs. These Justices argue that the Court should have taken the case because of the serious constitutional issues raised by this race-conscious, group-oriented action by the State. They suggest that the State's "affirmative action" violated not only the Constitution but also Title VII. And they suggest that the employer should instead have taken steps to justify the job-relatedness of its procedures,and that it should be as conscious of white as of black interests in considering what action to take. If employers cannot adjust scores in a Bushey-type situation, they presumably can also not scrap the test for an alternative device simply to avoid adverse impact -- this also would presumably constitute an illegal "preference" in those Justices' and in various Administration officials' minds.

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[27] Griggs and Weber have not been the direct targets of the Justice Department's recent assault. But the Department has challenged all forms of public employer-initiated affirmative action. If those are outlawed and Griggs undermined in the public arena, it is hard to imagine how Griggs and Weber can long survive in the private arena. And Weber has of course long been the subject of adverse comment by some in this Administration.

[28] Bushey v. New York State Civil Service Commission, 53 USLW 3477 (Jan. 8, 1985, U.S.Sup. Ct.).

The Griggs doctrine cannot meaningfully survive under these conditions, for the reasons indicated earlier. Validation according to strict requirements such as those spelled out in the Uniform Guidelines is simply more than society will be willing to demand with respect to all employer devices that have an adverse impact. And if the

Griggs standard is watered down so that employers are simply pushed in the direction of providing some evidence of job-relatedness, they will be able to justify many racially exclusionary systems, as indeed the Duke Power Company could have justified the devices struck down in Griggs.[29] Alternatively they are likely to produce "new" tests that have a very similar racial impact as the earlier versions. A look at the "second generation" testing cases reveals a large number of tests designed by the testing experts, supposedly to deal with some of the problems raised by earlier tests, which seem merely to replicate in new form earlier problems.[30]

Conclusion

These are the kinds of threats posed. What is important for your Subcommittees is that you take action to preserve what has been essential in the fight to eliminate discrimination and to create an integrated workforce. It is important that you function as guardians for E.O. 11246, for the Labor Department Affirmative Action Guidelines , and perhaps most important, for the Griggs principle as spelled out in the Uniform Guidelines. It is obviously important that you monitor the actions of the various Federal agencies under your oversight jurisdiction, and that you take whatever action you can to prevent them from moving to undermine or eliminate the principles of law endorsed by the Supreme Court in Griggs and by Congress in the 1972 Amendment to Title VII -- principles which require that employers be free to engage in race-conscious, group-oriented action. Administration officials are quite clearly moving in directions that violate the law as it exists today. That law can presumably be used to restrain their actions.

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[29] See Bartholet, supra n. 1 at 952-53.

[30] See Bartholet, supra n. 1 at 1008-09, 1011-12, 1022-23.

But the Administration -- primarily through the Justice Department -- is moving simultaneously to change the law through the Supreme Court. It is asking the Court to change the law as we have known it, and in ways that would not only radically limit the meaning of Title VII, but would also prevent Congress in future years from making Title VII and other anti-discrimination legislation meaningful again -- at least where public entities are concerned, and therefore constitutional issues involved. It is important for your Subcommittees to consider what kind of action would be effective in informing both the Administration and the Court as to Congress' views of the importance of established principles regarding discrimination and affirmative action, and of the potential for conflict between Congress and the Court.

Finally, it is important that you take action -- through legislation if necessary -- to clarify what the current law is for the benefit of employers and others who may now understandably be at a loss as to how to conduct themselves. Action is needed to clarify that the positions now being taken by various Administration officials are not the law. There is a real danger that while battles rage over agency regulations and over Supreme Court rulings, a large part of the war will be lost out there where employers are having in the meantime to make decisions. One of the potential tragedies of the current situation is that a movement which has been so slow and costly to build may have been brought to a grinding halt by the Administration's recent actions. I am talking here about the pressures that the law and previous Administration policies have created over the years on employers. Employers have been subject to the educational pressure of the law, and have gradually developed some sense that discrimination means something more than invidious intent. They have been subject to the *Griggs* liability pressure to get rid of systems with an adverse impact on blacks. They have been subject to various governmental affirmative action pressures. And in *Weber* they were finally told clearly that it was all right for them to move in the direction of developing affirmative action programs, even in the absence of litigative pressure or of government coercion. All these pressures have been in one direction, and employers today have a wide variety of programs in place designed to break down racial barriers in the workplace. They are now being told by the federal government that they will and should be subject to suit both by the government and by white employees for virtually any kind of race-conscious action. It seems to me that it would not take long for this new kind of government pressure to undo much of what has been painstakingly accomplished over the past few decades, even if the Administration is ultimately unsuccessful in changing regulations or in changing Supreme Court doctrine. Congress should move now to protect the progress that has been made by re-affirming the principles that Congress and the courts have long espoused in the battle against discrimination in the workplace.

Mr. Edwards. Thank you for splendid testimony, Professor Bartholet.

The gentleman from California, Mr. Martinez.

Mr. Martinez. Thank you, Mr. Chairman.

Mr. Chambers, I know you were paying attention to the previous witness when he expressed the notion that any time you eliminate discrimination for a group, you may be creating discrimination for another group. He even went so far as to say that the Court has held that is reverse discrimination and that the Court is not allowed to remedy by numbers.

He referred to statements made by the Supreme Court, and I think he is referring to statements made by the Supreme Court in reference to a Republican House report, where they hold that title VII does not permit the ordering of racial quotas in businesses or unions.

If there has been discrimination over a period of time, the only way that you can remedy that discrimination is to see that somebody who has been discriminated against is hired. Even if you insist that one qualified person be hired who was earlier denied employment, you have set a number that company must reach. So even if it's only one, it's still a quota, still a number.

How do you achieve parity without setting some order? In many cases, it takes a court order to establish that this company will now eliminate those discriminating practices by hiring one or more minorities. Even if you say one or more, it's still a quota.

Do you find an inconsistency in the previous member's testimony where he says that quotas cause reverse discrimination?

Mr. Chambers. I think, first of all, that Mr. Reynolds ignores the dual remedial purpose of title VII. One of the objectives is to place an established victim of discrimination in the place he or she would have occupied but for the discrimination.

The other is to provide class or prospective relief in the situation that you described for Mr. Reynolds during the questioning, and the courts have, as I have seen it, almost unanimously approved of that type of relief.

One can begin with numbers, looking at, for example, *Swann* v. *Charlotte-Mecklenburg*, or even going back before that with a case like *United States* v. *Montgomery County Board of Education* out of Alabama, where the courts specifically address numbers, because there was pervasive discrimination and the court did not look at an established victim but at the need for designing a remedy that would correct this pervasive discrimination.

In some later cases, where the court had some established victims, as in *Franks* v. *Bowman Transportation Company*, the court talked about the type of relief that could go to that established victim of discrimination.

But nowhere, including *Stotts*, has the Supreme Court suggested that class prospective relief is inconsistent with the 14th amendment or inconsistent with title VII, and I would think that in the case that you have put, the court would order prospective relief directing the employer to achieve certain goals within a certain time period.

Mr. **Martinez**. In your written testimony, you quote Justice Blackmun. He says, "In order to get beyond racism, we must first take racism into account."

Now, I don't understand Mr. Reynolds when he says that if you take race into account in setting any kind of a goal, you are then discriminating. Would you elaborate?

Mr. **Chambers**. I think that's why one might appropriately classify his argument as specious.

In order to correct discrimination, as Justice Blackmun pointed out, one has to look at the violation, and the violation is race discrimination. To correct it, one has to consider race and include race as a factor in the decision.

Mr. Reynolds doesn't address that. If he did, he would have to admit that in remedying pervasive discrimination, race is an appropriate factor and has been in cases not only in education, in employment, in voting rights, et cetera.

We have had, as I was trying to describe in the first part of my presentation here, a history of 16 or 20 years of race-neutral remedies where we achieved absolutely nothing. It was only after the Court began to impose race-conscious remedies that we began to see some significant changes in what was taking place. I think that's essential in 1985.

Mr. **Martinez**. I think that you distinguish between the victim-specific make-whole form of remedy and prospective race- and gender-conscious remedies. Do you see where the make-whole or victim-specific remedy is important and essential but that it does not exclude the need to exclude groups then just because we always would have the remedy of one individual?

Mr. **Chambers**. That's correct. I think one can go back to the hypothetical you describe. You suggested that people were deterred from applying. Mr. Reynolds would suggest that one has to go out and find all of these people and bring them in and prove that those individuals were deterred from applying and therefore were individually discriminated against. One may not find any of those individuals, or one may find those individuals and they may not be interested in any job with this employer.

Under Mr. Reynolds' theory, no relief would be forthcoming other than to direct the employer to go out and affirmatively recruit someone, and whether the employer hires anyone and whether the employer ever changes the racial makeup of his work force is not something that Mr. Reynolds is addressing.

That's why the class prospective relief remedy is important and essential, and in that instance the Court would direct the employer to implement goals and timetables for correcting that blatant discrimination.

Mr. **Martinez**. Thank you.

Ms. Barthelet, you have heard the Justice Department claim that the *Stotts* decision stood for the principle that all race-conscious remedies in voluntary plans were unconstitutional and only race-neutral plans are appropriate for affirmative action policies. Did the Supreme Court really reach those issues in *Stotts*?

Ms. **Bartholet**. The Supreme Court does not reach those issues in any sense of what it held in *Stotts*. On the other hand, four justices did sign on to an opinion which, I guess, gives me serious pause in terms of what those justices think.

I don't at all feel that Mr. Reynolds is justified in his statements that *Stotts* either commands or justifies what the Department of Justice has done. It doesn't. *Stotts* is a very limited holding, and there are only four justices who sign on to an opinion that goes anywhere toward what Mr. Reynolds is claiming *Stotts* means.

On the other hand, when I think of why these hearings are important, I think it's because, among other reasons, I do in fact have concern about where in some ultimate future the Supreme Court might come out on some of these issues, and I think there are at least several justices who come dangerously close in their views to the views of some members of this administration.

Mr. MARTINEZ. Thank you.

Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Hawkins.

Mr. HAWKINS. Again, in discussing *Stotts*, Ms. Bartholet, would you say that in *Stotts* class-conscious affirmative relief or affirmative action involving a race-conscious or sex-conscious approach was in any way rejected?

Ms. BARTHOLET. I think it was rejected only in the limited context of seniority. The only context in which the Supreme Court has held to date that there is any problem with affirmative action remedies is in the context where it interferes with what the Court holds to be vested seniority rights of whites. That's all *Stotts* does as a holding.

Mr. HAWKINS. I don't think Mr. Reynolds recognized that at all, because *Stotts* dealt with seniority rights, which has always been troublesome to the Court. I think probably that phase of it might have been consistent with some of the earlier rulings—would you say—as applied to seniority rights.

But let's go beyond that and let's eliminate seniority rights, which was really the main issue involved in *Stotts* if you take Mr. Reynolds' interpretation of affirmative action. I don't know whether you can take that interpretation or not, because I don't know what it really means, the way he describes.

Getting away from seniority rights again, does it interfere with the decisions earlier reached in *Weber* and in *Fullilove?*

Ms. BARTHOLET. Absolutely. I think that Mr. Reynolds' position is entirely inconsistent with what the courts of appeals unanimously and what the Supreme Court has previously said in the area of affirmative action. I think it's quite clear that what the Justice Department is out to do is to change the law, and what they have seen in *Stotts* is a spark of hope that they can persuade the Supreme Court to use the Constitution to change the law in a way that will tie all of our hands in the future. They don't, in my view, have any basis or feeling that the law, as it is now, justifies their position.

I think also, in response to your question about *Fullilove*, that Mr. Reynolds' statements this morning as to the real meaning of *Fullilove* are, in my view, grossly inaccurate, that his reading of *Fullilove* is an absurdly narrow and very misleading, I think, reading.

He tries to read *Fullilove* as if the Supreme Court endorsed there this limited principle that he believes in of victim-specific remedies being all you can get. *Fullilove*, in fact, is a case in which the Supreme Court endorsed a very broad rough justice kind of affirmative action in supporting the set-asides.

Mr. HAWKINS. Do you, by any chance, get any meaning or sense out of his definition of affirmative action?

Ms. BARTHOLET. I get meaning out of it. I feel it's quite clear that the only proper kind of "affirmative action," he seems to be saying, is a kind of affirmative action that existed in the pre-1964 days. In other words, he is saying it's OK to go out and put up signs and recruit—spend some extra race-conscious effort if you limit those efforts to things like recruitment, and then this morning he said maybe training. I didn't take him to be saying training in the sense that——

Mr. HAWKINS. That confused me also when he said training. I don't think he meant that.

Ms. BARTHOLET. I don't think he meant training in a *Weber* sense.

Mr. HAWKINS. My understanding is, he is confining it merely to affirmative things that you can do, not affirmative action, per se, but affirmative things, positive things, that you can do in advising individuals, trying to go out, recruit them, or engage in outreach activities so that they will at least know that, a job exists. Once you have done that, you have no obligation, legal or moral, to engage in any affirmative action in the process of actually employing, training or advancing individuals. The way Mr. Reynolds interpreted affirmative action just differs so greatly from, I think, anyone else's definition and interpretation of the law.

Reaching, however, beyond that to the larger issue, what support does his view have in judicial interpretations of the law?

If Mr. Reynolds has any basis that he can rest his philosophy on, I fail to see it, other than a very feeble one in *Stotts*, which, as we say, basically applied to seniority rights. His total rejection of the use of quotas under any circumstance, his rejection of set-asides or any of the other positive factors that have been used in any of the remedies, would seem to me to be so contrary to law and to actual congressional intent that I fail to see how it gives him some basis, in fact, for his position. Would either of you comment on that issue.

Ms. BARTHOLET. I don't feel he has support in current law for his position. What I find frightening is that he and the administration are quite clearly setting out to change the law. Since the law has changed in the past, as have interpretations of the Constitution, I think what is important is that there be some very significant counter-administration pressures to ensure that we continue to live with the laws that exist today.

Mr. HAWKINS. Mr. Chambers, you did cite various correspondence which you have had that you said were the answers to the Department of Justice's request on the consent decrees. May I ask you how you were able to get this correspondence from the administration? The administration has attempted to shield its correspondence with the various State and local entities that were asked to consider making changes in their consent decrees.

[The Department of Justice letter follows:]

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General
Washington, D.C. 20530

July 10, 1985

Honorable Augustus F. Hawkins
Chairman
Committee on Education and Labor

Honorable Matthew G. Martinez
Chairman
Subcommittee on Employment Opportunities
Committee on Education and Labor

U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairmen:

This is in response to your letter of May 28, 1985 in which you request copies of the original justification memoranda for the 52 cases the Department recently identified as involving consent decrees inconsistent with *Firefighters Local Union No. 1784* v. *Stotts*, 104 S. Ct. 2576 (1984). In addition your letter requests justification memoranda related to the Attorney General's decision to reopen any of such cases.

Justification memoranda of the type requested have traditionally been retained within the Department containing, as they do, the opinions, recommendations and advice of Department attorneys involved in the deliberative process. See e.g., *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939 (Ct. Cl. 1958); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D. D.C. 1966), aff'd on opinion below, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967). In addition, courts have consistently construed Title VII as not permitting an inquiry into the bases for the Attorney General's certification that there is reasonable cause to believe a pattern and practice of discrimination exists. See e.g. *United States* v. *Ironworkers, Local No. 1*, 438 F.2d 679 (7th Cir.), *cert. denied*, 404 U.S. 830 (1971).

Given this uniform and longstanding Department position, and the fact that many of the requested documents relate to ongoing litigation, I hope you will agree that production of these documents -- most of which were generated in prior administrations -- will not be necessary. If there are specific questions that you or members of the Committee wish to raise involving these cases, I would be pleased to brief you on them privately so that you may carryout your oversight function.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs

Mr. **Chambers**. We were able to obtain this information only through a proceeding under the Freedom of Information Act. We made initial inquiries and requests for the responses but were turned down, and we brought a proceeding under the act to obtain these documents and got it that way.

Just commenting briefly on your last question with Professor Bartholet, I would agree with her that Mr. Reynolds does not find support for his position in existing decisions, nor do I think in legislation or legislative history. He refers, as did four members of the Supreme Court, to some legislative history during the enactment of the act in 1964.

But I think that Justice Blackmun correctly points out the purpose of that discussion during the Congressional debates and the Senate debates on the act of 1964, as well as the clear intention of Congress to incorporate the decisions approving of affirmative action in the amendment to that act in 1972.

So I don't see any congressional or judicial support for the position that he is advancing.

Mr. **Hawkins**. He is out there by himself, and he wants to drag Secretary Brock in, which is unfortunate.

Mr. **Chambers**. I read it that way. I would caution though, and I think it's important that we all look at what has taken place across the board.

Let me quickly mention one thing for the committees' concern in the employment discrimination area. When I first began litigating title VII cases, I could litigate a case for $2,500 or $5,000. What has happened in the implementation of title VII now is that, through efforts of the Department, the procedural interpretations of the act are much more conservative and restrictive.

One might look at a recent fourth circuit decision dealing with the Agricultural Extension Services of North Carolina. The method of proof in those cases is much more difficult.

As Professor Bartholet was saying a moment ago, one of the assaults is to eliminate the *Griggs* disparate impact approach. In the disparate treatment approach, plaintiff's counsel have to go through much more in developing a case today than what I think Congress thought about or reviewed in 1964 or 1972.

Just looking at the procedural hurdles and the proof problems in employment discrimination cases today, one sees a change from the $2,500 I mentioned to something like $50,000 to litigate one of those cases. If one were dealing with a class action, one could go from the $10,000 to $50,000 in the early stages of the act to something now like $500,000 or more. If one wins today, we are dealing with very limited relief.

If we accepted Mr. Reynolds' suggestion, we would have only victim specific relief, and no one individual can afford today to go through the hurdles of this kind of litigation to obtain some kind of relief.

It was because of this in the early stages of the implementation of title VII that the courts imposed affirmative relief where one individual, as in the *Albemarle Paper Co.* case, could bring a proceeding, establish a pattern and practice, and could get broad relief that would affect the whole class.

What we are facing today is an effort to cut that out so that we would have one individual who maybe could find $50,000 through some means to bring one case and get very limited relief. Very few individuals want to run that risk.

Additionally, the private bar has been the principal source for implementing the act. Mr. Reynolds suggested that his Department had brought some 49 cases. One needs to carefully look at the 49 cases that were brought. One needs to look at the relief that was obtained, and I think one can see that the limited cases that the Department of Justice has been involved in do not amount to very much in terms of the total number of cases that have been filed and litigated.

So if the affirmative relief that we have been discussing is eliminated as a remedy in Title VII cases, we will have a serious problem with the implementation of Title VII.

Mr. HAWKINS. Thank you.

Thank you, Mr. Chairman.

Mr. EDWARDS. The gentleman from Illinois, Mr. Hayes.

Mr. HAYES. Thank you, Mr. Chairman.

Ms. Bartholet, would you say that unanimous rejection of the Department of Justice's expansive interpretation of *Stotts* by the four U.S. circuit courts of appeals which have considered the issue suggests that the Justice Department's position is legally incorrect and that its resources might be better used in protecting the rights of historically disadvantaged women and minorities?

Ms. BARTHOLET. I certainly think its resources could be better used. I think its position is legally incorrect as far as the law goes today.

My only concern, and the only reason I seem to hedge there, I guess, relates to a comment Mr. Hawkins made also. It's that I think that "legally correct" depends on what at any point in history the Supreme Court says is the law and other courts say is the law.

I think that Mr. Reynolds is clearly not out alone in terms of this administration. I think that he represents a very strong move by this administration to change the law as we know it in ways that would be enormously destructive of minority rights. Where they haven't been successful, I think it's important to do what we can to prevent their success.

Mr. HAYES. Mr. Chambers, I notice that you, the NAACP—and I'm sure you were in attendance, as I have been in the past—just concluded its convention down in Dallas, and I know you must have grappled with the problem of how do we halt the administration's attempt to negate or make ineffective the gains we have made during the 1960's in the whole civil rights arena.

Press coverage of the convention itself was indicative, I think, of the time we live in, because it wasn't as broadly covered as it had been in the past. Yet we have got rising unemployment in the black community and other minorities. Small minority businesses are struggling trying to survive. Many are filing Chapter 11 because of the economic situation.

The public education system, which most minorities—blacks—have to go to if they are going to get an education, is suffering from the shocks when it comes to funding. The support programs, as we try to reduce the deficit here at the Federal level, are going to play havoc with some of these kinds of programs, from Head Start all the way to college.

I'm just wondering if the convention came out with any set approach, other than the legal method, of trying to combat these. We may have to return, as we are going to do in Chicago, I guess, to demonstrative kinds of actions in order to preserve at least what we think we got in the way of affirmative action in the two departments which I mentioned to the young man who just left here.

Do you see us returning to the approaches that we used in the 1960's as a mechanism to demonstrate that we are not going to give up that which we have gained over the years?

Mr. **Chambers**. First let me say that I did not get a chance to attend the NAACP convention in June and July. I did follow it, however, very closely and was concerned, as I'm sure the members of the NAACP are, with the developing problem that we all are facing. The problem is very grave.

Just quickly, you probably saw the article in the Washington Post the other day about the decreasing number of minorities in higher education. That's a serious concern to all of us. We see the increasing number of minorities in the unemployment ranks, the increasing problem that minorities are having in housing, et cetera. So there are some real problems, and they are becoming worse.

But I remain optimistic about all of this. We hear the arguments of the Department of Justice in the affirmative action area, for example. Basically, every court that has considered that argument has rejected it, and I'm not as pessimistic as some of my colleagues about what will probably happen when the issue is firmly presented to the Supreme Court. I think that Court has been responsive to the issues and problems, and I remain optimistic.

Your question whether we will have to use some other tactics—I'm not certain. I do see, despite the challenges that we are facing, responsiveness in some courts and responsiveness in Congress. I think as we—that is, the victims of discrimination—continue to look at new methods for addressing our problems, we may be able to develop other means for achieving those goals, or we may have to go back, depending on the receptivity of others to our efforts.

Mr. **Hayes**. Thank you, Mr. Chairman. I'm sure my time has expired.

Mr. **Edwards**. Thank you, Mr. Hayes.

We are very grateful to both the witnesses. Because we have three more witnesses, in courtesy to them, I am going to forego my questions. My colleagues have asked some insightful questions, and certainly your statements have been very helpful.

As you can see from being here while Mr. Reynolds was testifying, we have a formidable task with this administration on civil rights. On school desegregation, it's very near to going back to the doctrine of "separate but equal." On voting rights, it's nonenforcement of the Voting Rights Act. On title IX for women in educational institutions, it's go back to the old days when the men play and the women are not allowed in the gym. It's really formidable.

People like you, giving such helpful testimony, we appreciate it very much.

Ms. Bartholet. Thank you.

Mr. Chambers. Thank you.

Mr. Edwards. Our next witness is a gentleman who didn't know that he was going to be this famous, Carl W. Stotts, district chief of the Memphis Fire Department, Memphis, TN.

We are delighted to have you. You didn't know you were going to be a household name, did you?

TESTIMONY OF CARL W. STOTTS, DISTRICT CHIEF, MEMPHIS FIRE DEPARTMENT, MEMPHIS, TN

Mr. Stotts. Well, really, when this thing started out, I had no intentions of ever being here today.

I appreciate the invitation, Mr. Chairman and committee members.

I'll start off as identifying myself as Carl W. Stotts, Memphis Fire Department district chief.

Gentlemen and ladies, I can assure you that I would not be here today if it was not for affirmative action. As you can see from my testimony, in fact, today is my anniversary day with the department. I have been with the fire department for 30 years as of today.

In those 30 years, down through the years, I have suffered, and I still suffer today. In fact, there was recently an opening in the Memphis Fire Department for fire director. I've got witnesses back there with me, with the Pioneer Organization, that came up with me, and they can testify to the fact that they approached the mayor and gave the mayor some names. He said, "Give me some names." When they gave the name of Carl Stotts, he said, "No way." They asked, "Why? The man is qualified, experienced, education-wise, so why not?" He said, "You know why. Because of his controversial acts"—of trying to do something for other people, not for me, because Carl Stotts has got 30 years; he can fully retire; but all of this effort was because of my fellow man.

I could have been someone who sold out, someone who grabbed the basket of eggs and ran with them—opened up the fence, said, "OK, I'm under," closed it back down and left everybody out, but that's not my nature.

Now, during my suffering with the fire department, I was hired in 1955. Really, it was, I guess, a political hiring, because for over 100 years, Memphis never had a black firefighter, because this was Mr. Crump's town, and Mr. Crump said, "We're not going to have it here."

But through the efforts of the NAACP, the city decided to hire black firemen, and I was one of the first ones. We were hired in an all-segregated fire station, one fire station, with the promise that if we came on and did the job, and did a good job of it, they didn't promise us integration, they promised us that we would be able to run that station, 12 of us.

We stayed in that station for 10 years. They never hired another one, and they also kept white officers over us all that time, and we were very qualified.

Some of the things that would happen—they would say, "We are going to send you this lieutenant to your station"—a white lieutenant—white male. "We want you to look after him, show him the ropes." Now, we could show him the ropes, and we could take the ropes ourselves, but this was the way it was back in the 1950's.

I guess it's like some people asked me today, "Well, why did you decide to do this?" I didn't decide to be a hero or whatever, or place my feet in the prints of sand. I guess I did it because of what Rosie Parks did. She was tired, and I was tired of seeing what was happening all around me, seeing my peers with less experience working with me, going up the ladder, and we were at a standstill.

Now, when I decided to take the city to court in 1975 because of discrimination in hiring practices, that was it. In the whole history of the fire department, Memphis had never had a layoff. They used to be proud of having a job, of not laying off: You've got a regular job; if you come to work, then you're going to have a job.

They decided to have a layoff, and the reason, I think, they decided to have a layoff is because of the 1980 court decree where the court spelled out goals.

I'm not concerned about quotas; quotas mean nothing to me, but I am concerned about timetables and goals. The timetables and goals were set out.

So in 1981 the city of Memphis promoted for the first time in history—we had to almost had to go and hire some more to get 20 black firefighters promoted to lieutenants. After they were promoted, the city saw a way to get rid of them. The way to get rid of them was to demote them back to their past positions, and the ones that had less seniority, they were going to bump them out in the street.

When I got positive information that they were going to do this, we went back before the judge, because layoffs were not spelled out in the 1980 court decree. Everything else was taken care of but the layoff provisions. The district judge said, "You can't do this because you are going to interrupt the Affirmative Action Program."

Now, I didn't get to the Supreme Court because Carl Stotts wanted to go. The local union, Local 1784 of the Memphis Firefighters, when they discovered and found out that their people—the majority white—were going to be laid off too, they said, "Unh, unh, we're going to take you to court."

They went to the Sixth Circuit Court in Cincinnati. They upheld the local judge's decision. They decided to carry it on to the Supreme Court.

Now, the *Stotts* case that went to the Supreme Court really wasn't supposed to go, because Boston had a similar type situation, but the State of Massachusetts decided to do something about it, to fund the money and make it into law that they never would have a layoff, so then they dropped down and picked up the *Stotts* case.

The *Stotts* case was not a case of affirmative action; it was strictly based on seniority—seniority rights. The very day, June 13, 1984—the very day after the decision, I read in the news media where Mr. Reynolds was going around the country, contacting cities that had affirmative action programs, trying to get rid of them.

So, summing it up, minorities must always have—not today or tomorrow but forever—always have some type of affirmative action in order to reach the goals and tasks that they are set out to do.

They took this case, completely turned it around, didn't interpret the Supreme Court case right, and turned it around to an affirmative action case, and that wasn't the case, that wasn't the intention of the case, but it just never was clarified.

Now, after the gains that were made under affirmative action, in fact we are going to litigate, even after the city of Memphis decided what we were going to do—we were going to promote, et cetera, according to your decree. Right today, we have got to go back to court—right this day—in order to make them do the promotions that they should be doing. So it's going to forever be.

To sum it up, we have made few gains, and as it stands now, I won't be around to see it, but at the 1 percent that we are doing every year, it will take 30 years to reach our goals.

Thank you very much.

[The statement of Mr. Stotts follows:]

TESTIMONY OF CARL W. STOTTS

My name is Carl W. Stotts. I am the lead plaintiff in Firefighters Local 1784 v. Stotts, the case decided by the U. S. Supreme Court in 1984 that prohibited race-conscious lay-offs where a seniority system was in place. I am here today to testify on behalf of affirmative action so that prior overt racial discrimination can be remedied.

I was hired by the Memphis Fire Department in 1955 as one of twelve blacks. We were the first blacks ever hired as firemen, and we were assigned to a segregated engine house in a black area of the city. No other blacks were hired until 1962 and then only a few blacks until 1977. Today blacks make up only 13.7% of the firefighting positions in a city that is approaching 50% black in population.

When I came to the Fire Department, black firemen were segregated at one station. Most of us had some college training, but we were never promoted until 1968 when a black lieutenant was made. I had always passed the promotional exam for lieutenant, but time after time whites with lower test scores, less educational background, and less seniority were promoted over me. I was seriously injured in a factory fire in 1974 and was off duty for almost a year. Even with my extensive experience in firefighting and my devotion to my job, I was not promoted to captain until 1976. I am now a district chief in charge of a fire batallion. One of my 1955 black colleagues was just recently appointed

Deputy Director of the Fire Department after a concerted effort by the Pioneers, an organization of black firefighters started by us in 1971.

It was only through the vehicle of litigation and unity among black employees that we have made the present gains. The following statistics show how much progress we have made in the last 5 years:

	Black		White	
	1979	1984	1979	1984
Private	100	102	594	468
Driver	8	15	281	248
Lieutenant	2	31	215	187
Captain	1	8	73	67
District Chief	0	3	20	30
Deputy Chief	0	1	4	5
	111	160	1187	1005

Unfortunately, even at this rate of a gain of 1% per year it could conceivably be another 30 years before we approach 50% representation that is reflective of our community. This the the tragedy of racial discrimination, it will take years to remedy. But, without court enforced affirmative action, we would still be without a remedy for historical, state-enforced racial segregation.

Mr. **Edwards**. Thank you very much, Mr. Stotts.

We are going to have to leave for a few minutes for a vote, but we'll be right back.

Chief, that's great testimony, and we're awfully glad you're here.

[Recess.]

Mr. **Edwards**. The subcommittee will come to order.

Thank you again for your very interesting and helpful testimony, Mr. Stotts.

You began in the Memphis Fire Department, and it was totally segregated. I think that was your testimony. What was life like when it was totally segregated?

Mr. **Stotts**. Mr. Chairman, do you really want to know?

Mr. **Edwards**. Yes.

Mr. **Stotts**. Well, it's so embarrassing that sometimes I really don't like to talk about it.

We were housed, like I said, at 825 Mississippi, which was at the time and is now a predominantly black neighborhood. We never got the chance to get the experience of being assigned to another engine house, to get the truck work, the rescue work, et cetera; we had to stay in that engine house.

They had two white officers, a lieutenant and a captain, that were in charge of the station. We all lived in the same station, but they had separate quarters—separate sleeping quarters, separate living quarters—and we served as their servants. We made their beds in the morning, we cooked their food, and on certain occasions the captain or lieutenant would throw his boots in the corner. At first, he would just throw them in the corner for you to shine his boots. Some people rejected it. Then he came out with an order, you know, When I put those boots in the corner, I want them shined—this type of harassment.

When we would go to fires, we'd be the first to get there and the last to leave. They would keep us there to do the clean-up work, the dirty work, or whatever. We never got a chance to go out. They had a procedure of going out every day, inspecting business places in the community—grocery stores, sundry stores. We had orders; If it's a white store, don't go in it; just only inspect the black ones.

I remember this occasion, and it always sticks in my mind. There was a Holiday Inn—a fairly new Holiday Inn—located within our territory. When we arrived on the scene, one of the rooms was completely engulfed in flames, and at that time it was segregated facilities; blacks could not register in those inns. Because of white residents, we were told to stay on the street and not go in until all of those half-clad people came out and took their places.

Several of my peers that came on with me decided that this was too much, too bad, "I cannot take any more of it," and they left; they just quit and went on into other professions. I probably would have, myself, if I hadn't had the encouragement of my wife. She would tell me every morning that I would get up to go to work. I would sometimes sit beside the bed for 30 or 40 minutes, dreading to go, and she would say, "Oh, go on. It's going to be all right one day; it's going to be all right one day." But that one day seemed like a long, long time.

Now, your question may be, "Well, why did you stay?" I knew that this was a testing period, and if every black that was hired in

1955 had walked away, then there never would have been—they would have hired another one. They would have said, "See; I told you so; they can't take it; they can't be a fireman; they can't fight fires; they cannot come into a neighborhood and protect their own people." This is all we were asking, to protect our own people. We weren't asking for integration. Let us command our own station; let us have the experience. This is all we were asking for.

Mr. Edwards. And you won your case in 1975. Is that correct?

Mr. Stotts. No. Well, first of all——

Mr. Edwards. I'm trying to have you tell us what happened after they agreed in the city of Memphis to shape up.

Mr. Stotts. Well, you see, I worked on this case for 15 years. It took 15 years to get it resolved. I don't hold it against them. I guess they were just afraid to do it. But none of my peers wanted to go along with me. I stayed out there for 5 years by myself, having potshots at me.

First of all, several of us—we had a new director who was recently appointed. We made several trips to his office, pleading with him to please go on record as to hiring promotional procedures for minorities. I guess we probably made at least 10 trips to his office periodically—over a period of 2 years. So one of the days they contacted me and wanted to go back, I told them never, never again, that the next time they would see me, it would be in some kind of court action.

So I guess I took the easy route. I went to EEOC. You know how EEOC is. They have got a backlog of cases, because this is a way to go and it doesn't cost you any money.

So the thing stayed in EEOC for 2 years, and they did absolutely nothing—never did touch it—so I finally got it away from EEOC and filed a class action suit. Well, first I filed a plaintiff suit, myself alone, and after my coworkers—the class members—saw that I was really serious, they wanted to join me.

The city decided that this was too much. They fought hard to have them join me. So we went to the judge, and he agreed to let the class members. But the initial court case filing of it—I depleted my savings to the tune of $5,000 just to get it into the courts. Eventually I got the money back. But then they came in on the case.

Well, the case stayed there for several years, and finally the city decided that—it must have been something they didn't want to have happen public or whatever. They decided to do an out-of-court settlement, and that's how it ended up. That's how it was litigated, in an out-of-court settlement in 1980.

Mr. Edwards. Did things change then right away in the department?

Mr. Stotts. Right today, affirmative action has made things happen, but the attitudes are the same. We have attitudes on the Memphis Fire Department that are not coming from law, they're coming from up top. In fact, the former director of the department made a public statement in one of the Memphis magazines about the court case itself. He said, "I don't like it"—the case itself—"worth a damn, but being a citizen, a law-abiding citizen, I'm going to do it."

Now, what is that telling nonminorities? "I am forced to do it; you do like you want to do." So the attitude in the department is the same. In fact, the attitude among whites is that, "I don't want these blacks in the enginehouse, working with us," but if we had the right thinking director, he could have cut that off at the pass by saying, "Look, this is the way it's going to be, and you either like it or you leave."

Mr. EDWARDS. Well, Mr. Stotts, we are going to have to move along, but let me ask you the last question.

Mr. STOTTS. OK.

Mr. EDWARDS. What happened after the Supreme Court case? Have things changed?

Mr. STOTTS. Mr. Chairman, they still haven't changed. Like I said before in my earlier statement, we are in the process; vacancies have occurred, and they have set aside promotions that blacks are supposed to have, but the city doesn't want to give them up; so we are having to go to court right now to litigate, to force them into doing it.

Mr. EDWARDS. Pretty intractable.

Well, we do have two more witnesses, Mr. Stotts. We want to thank you very much for coming here today. You have made a great contribution not only to the minority people of the United States but to your country, and we deeply appreciate it.

Mr. STOTTS. Thank you very much, Mr. Chairman.

Mr. EDWARDS. Thank you.

Our last two witnesses consist of a panel. I'm very sorry that we have kept them waiting. The panel consists of Mayor Thirman Milner of Harford, CT, representing the National Conference of Black Mayors; and John Gunther, a friend of ours for many years, executive director of the U.S. Conference of Mayors.

We welcome you both. Of course, without objection, your statements will be made a part of the record, and if you can summarize, we'd appreciate it.

TESTIMONY OF HON. THIRMAN L. MILNER, MAYOR, HARTFORD, CT, NATIONAL CONFERENCE OF BLACK MAYORS; AND JOHN J. GUNTHER, EXECUTIVE DIRECTOR, U.S. CONFERENCE OF MAYORS

Mr. MILNER. Thank you very much, Mr. Chairman.

Good afternoon, members of the House Education and Labor and Judiciary Committees, ladies and gentlemen who are remaining.

I'm Thirman L. Milner, mayor of Connecticut's capital city of Hartford. I'm also the first vice president of the National Conference of Black Mayors. In this capacity, I am pleased to offer this testimony for the Congressional Record supporting affirmative action. I will just briefly highlight some points in our organization's document, since you have it for the record.

The National Conference of Black Mayors is comprised of more than 290 mayors and is organized primarily to provide community and economic development assistance to member cities and towns.

However, as a network of local officials representing, in the aggregate, some 20 million American citizens and administrating the affairs of many of the larger and most important cities in this Nation, our organization has often been called upon to express our views on matters of national policy, and it is, in our opinion, highly appropriate and constructive that we share with this body our thinking on the *Stotts* decision and its implications and bearings on equal employment opportunity for all Americans.

I applaud Mr. Stotts for his stand for others.

The position of the National Conference of Black Mayors on this issue can be stated concisely, and it's clearly articulated in the resolution passed at our most recent annual convention held in my city of Hartford during April of this year.

First, our membership recognizes the success and legitimacy of race- and sex-conscious affirmative action programs with numerical goals and timetables as a remedy for effects of past and present discrimination.

Second, we believe the actions of the Reagan administration, through the Department of Justice, are unjustified and unreasonable, based on the Supreme Court's ruling in the *Stotts* case and, if not effectively countered, will greatly reduce the level of minority and female hiring and promotions in both public and private employment and create enormous practical and political problems.

Third, we firmly oppose the efforts of those in government to eliminate court-approved affirmative action plans for minorities and women and have urged our membership and all of our colleagues in cities and towns across this Nation to resist and reject Justice Department overtures seeking modification to court orders. We believe there is a substantial legal justification for this position based on the *Stotts* decision.

The Justice Department has sought to intervene without invitation or legal justification in court cases where affirmative action plans are at issue, arguing against their use based on the agency's broad interpretation of the *Stotts* decision.

There is broad agreement that these recent moves by the Justice Department are only the latest in a series of actions by the administration intending to undermine and reverse two decades of progress in reducing employment discrimination.

The legal implications are less important than the practical recognition of facts. Unfortunately, it is a fact that racism, sexism, bigotry, and discrimination are an integral part of American history even today and, in some cases, even more so today. It is a fact that black family income is only 57 percent of white family income. It is a fact that black unemployment is double that of white unemployment. It is a fact that many people are discriminated against every day in this country in employment and promotions because they are members of racial minority groups or because they are women.

As mayors of this Nation's cities, we witness on a daily basis the contributions and achievements of minorities and women in providing municipal and private sector services which could not and would not have occurred without mandated affirmative action goals and timetables both in employment and contracting.

As an organization of mayors, we oppose racial discrimination in employment because it is unjust morally and counterproductive economically. We recognize reverse discrimination arguments for what they typically are, ludicrous and dangerous assaults on the enlightened principles of fairness, equality, and laws embedded in our Constitution.

We, as an organization, have called upon the administration and Justice Department to end their attacks on affirmative action and to vigorously enforce the laws with regard to employment discrimination rather than attempting to distort them so that they perpetuate the very discrimination they were enacted to prevent.

This is just briefly the statement of the National Conference of Black Mayors. I would like to add a few personal observations.

First of all, the word "affirmative" means positive action. There is no such thing as reverse discrimination. Either you are discriminated against or you are not. My feeling is that if a person is discriminated against because he is black, white, or brown, these are laws to protect them. It does not mean you have to throw the baby out with the bathwater by dismantling affirmative action goals and guidelines. Affirmative action addresses equal opportunity with the intent to bring parity to the workplace, nothing more, nor should it be nothing less.

I am a product of the civil rights movement here in America. In my city, prior to that movement, there were few blacks and no Hispanics, just about, in our insurance companies, banks, department stores, hotels, or doing work with contractors. Most were at the lowest levels of employment.

Affirmative action and equal opportunity have changed that to some degree, but not to the extent that it needs to be dismantled at this time. Equal employment has not been accomplished in America today.

In my city, for instance, which has a population of some 35 percent blacks, 20 percent Hispanics, and 45 percent whites and others, we have affirmative action minimum goal standards in both the private and public sectors that range anywhere from 15 to 25 percent and in some cases maybe a little higher.

In far too many cases, once the minimum is reached, both our public and private sectors stick out their chests and add the term "equal opportunity employer" to the bottom of their stationery, leaving some 15 to 40 percent of our minority population locked out of the job market. However, with no affirmative action guidelines, that number would increase, and job training by unions, corporations, and business for the hard-core unemployed employables of this nation would become nonexistent as these employers would once again go back to the practice of creaming the top of the job-ready market.

Presently, some 70 percent of our local employment market comes from our predominantly nonminority suburbs, yet our city's residential population is listed as one of the poorest in this nation, in spite of the fact that it is the insurance capital of the world. In some areas, we have unemployment up to 20 and 25 percent and more in the city of Hartford, and if it were not for the meager percentages under affirmative action goals, that number would be much higher.

Who suffers? We all do. Our welfare rolls increase as well as this Nation's deficit. Before anyone dismantles affirmative action, I suggest for those in Congress and the administration that feel affirmative action is not needed that they do what Congress does when it wants to get a true view of what goes on in other nations, that they establish a congressional investigative committee; come to my city and other cities across this Nation; go into both our public and private sectors; and match the number of minorities, blacks, and Hispanics, and women at all levels of employment with the minority population of these cities. They will find that affirmative action is working and is still needed but is not really affirmative because it does not address the real population of our various communities.

I'd be the first to ask the President and Congress to dismantle affirmative action programs once parity is brought into the workplace across America. Past discriminatory practices are still impacting our society, even the newborn. Infant mortality among disadvantaged, unemployed minorities is the highest in this Nation. These babies will never have the opportunity to grow, let alone work. At least we should give those who do live an opportunity, not by discriminating or dismantling, but by putting some stronger teeth into our affirmative action programs instead of dismantling it, so that every able-bodied American will have an equal opportunity to grow, and to work, and to live in dignity.

In conclusion, Mr. Chairman and Members of Congress, this Congress recently made Dr. Martin Luther King's birthday a holiday, and the position of the President was that he would sign it into law, and he did, but this holiday will be meaningless—will have no meaning whatsoever in America—if we are not committed to what his dream was all about. Affirmative action is a part of that dream, because affirmative action makes the main part of that dream, the fulfillment of equal opportunity, a reality in America. It is neither outdated nor is it obsolete, and I would suggest that any action that could be taken by this Congress be not to dismantle any of the affirmative action programs but, instead, to put teeth into it.

Thank you.

[The statement of Mr. Milner follows:]

TESTIMONY OF NATIONAL CONFERENCE OF BLACK MAYORS, INC.

on Affirmative Action

Presented by

The Honorable Thirman L. Milner

Mayor of Hartford, Connecticut

Thursday, July 11, 1985

A Joint Oversight Hearing of the SubCommittee on Employment Opportunities (House Committee on Education and Labor) and the Subcommittee on Civil and Constitutional Rights (House Committee on the Judiciary)

Good morning to Congressman Edwards, Congressman Martinez, distinguished members of the House Education and Labor, and Judiciary Committees, ladies and gentlemen. I am Thirman L. Milner and I serve as Mayor of Hartford, Connecticut. I also serve as 1st Vice-President of the National Conference of Black Mayors, Inc. and in this capacity I am pleased to offer this testimony supporting affirmative action. The National Conference of Black Mayors, Inc. is comprised of more than 290 mayors, and is organized primarily to provide community and economic development assistance to member cities and towns. However, as a network of local officials representing in the aggregate some 20 million American citizens, and administering the affairs of many of the largest and most important cities in the U.S., the organization has often been called upon to express our views on matters of national policy, and it is in our opinion highly appropriate and constructive that we share with this body our thinking on the Stotts Decision and its implications and bearing on equal employment opportunity for all Americans.

The position of the National Conference of Black Mayors, Inc. on this issue can be stated concisely, and is clearly articulated in a resolution passed at our most recent annual convention, held in Hartford during April of this year. First, our membership recognizes the success and legitimacy of race and sex consciousness affirmative action programs with numerical goals and timetables as a remedy for the affects of past and present discrimination. Second, we believe the actions of the Reagan Administration through the Department of Justice are unjustified and unreasonable based on the Supreme Court's ruling in the Stotts case, and if not effectively countered, will greatly reduce the level of minority and female hirings and promotions in public employment, and create enormous practical and political problems. Third, we firmly oppose the efforts of those in government to eliminate court approved affirmative action plans for minorities and women and urge our membership and all our colleagues in cities and towns across the nation to resist and reject Justice Department overtures seeking modifications to court orders and consent decrees requiring affirmative local actions to promote equal employment oportunity.

We believe there is a substantial legal justification for this position. The Stotts Decision stemmed from a 1979 federal suit filed by black firefighers in Memphis, Tennessee charging racial discrimination in hirings and promotions. The city did not admit to violations of law, but in settling the suit in 1980, agreed to increase minority representation in the Fire Department, setting specific hiring and promotional goals. The settlement was approved by the U.S. District Court. In 1981, the City of Memphis because of a budget deficit, announced layoffs would be carried out on a "last hired-first hired basis," bringing the Fire Department's seniority provisions into conflict with the goal of increasing the proportion of black firefighters hired and promoted. The plaintiffs in the 1979 discrimination suit sought and obtained an order from the Federal District Court to halt the layoffs because of its negative impact on the progress of minority employment achieved under the original settlement. The order was upheld by the U.S. Court of Appeals for the Sixth Circuit; subsequently, the City and the Firefighters' Union took their appeal to the Supreme Court. The Court's 1984 decision upheld the City and Firefighters' Union, the majority opinion holding that the District Court was "without power to modify a decree that had the effect of setting aside a bona fide seniority system in favor of maintaining a certain percentage of blacks, if whites with more seniority were displaced, where there was no showing of past discrimination."

In 1984, the Justice Department sent letters to some 56 local governments asking them to seek modifications to court orders and consent decrees which give perference to minorities and women in hiring and promotions, using as justification the far-fetched interpretation that the Stotts Decision had made numerical goals (termed "quotas") illegal as a remedy for job discrimination. In recent months, the Justice Department has sought to intervene without invitation or legal justification in other court cases where affirmative action plans are at issue, arguing against their use, based on the agency's broad interpretation of the Stotts Decision.

It is important to note that Appellate Courts since Stotts have narrowly interpreted the decision, basing their rulings as the validity of various affirmative action plans upon whether there had been a showing of past discrimination (Wygant V. Jackson Board of Education, Vanguards of Cleveland vs. City of Cleveland, etc.), but not invalidating affirmative action and race and sex-conscious remedies for past discrimination, in and of themselves. Moreover, there is broad agreement that these recent moves by the Justice Department are only the latest in a series of actions by the Administration intended to undermine and reverse two decades of progress in reducing employment discrimination.

The legal implications are less important than the practical recognition of facts. It is a fact that racism, sexism, bigotry, and discrimination are an integral part of American history. It is a fact that black family income is only 57% of white family income; it is a fact that black unemployment is double that of white unemployment; it is a fact that many people are discriminated against every day in this country in employment and promotions because they are members of racial minority groups, and because they are women, and that others are advantaged because they are white and male. It is a fact that as mayors of cities, we witness on a daily basis the contributions and achievements of minorities and women in providing municipal services, which would not occur without concrete affirmative action goals and timetables in employment and contracting.

As black mayors, we oppose racial discrimination in employment because it is unjust morally, and counter productive economically. We recognize "reverse discrimination" arguments, for what they typically are; ludicrous but dangerous assaults on the enlightened principles of fairness, equality, and law embedded in our Constitution. We call upon the Administration and the Justice Department to end their attacks on affirmative action and to vigorously enforce the laws with regard to employment discrimination, rather than attempting to distort them so that they perpetuate the very discrimination they were enacted to prevent.

Mr. Chairman, this concludes my testimony.

Mr. **Edwards**. Thank you very much, Mayor Milner.

John Gunther, executive director of the U.S. Conference of Mayors.

Mr. Gunther, it's nice to have you back.

Mr. **Gunther**. Thank you, Mr. Chairman.

I want to commend both you and Chairman Martinez and the members of your two subcommittees for giving us this opportunity, because I think this is the kind of effort that is going to be needed to save affirmative action.

Mayor Morial of New Orleans is president of the Conference of Mayors this year, and he is out of the country, working on economic development opportunities for his city and asked me to come here today.

I would like to associate the U.S. Conference of Mayors with the remarks of Mayor Milner on behalf of the Black Conference of Mayors. On this question, we stand totally together, as the resolutions in my prepared statement will indicate.

On June 19, at their 53rd annual conference in Anchorage, AK, the mayors of the Nation adopted an affirmative action resolution sponsored by Coleman A. Young of Detroit and Tom Bradley of Los Angeles, and it supports very much the same resolution that Mayor Milner referred to.

I'd like to add three points, Mr. Chairman. The Conference of Mayors represents the cities with populations of 30,000 or more in the United States, and we support very strongly affirmative action as essential to assure fair and nondiscriminatory employment treatment.

Second, local governments have reached agreement in the employment discrimination field and do not welcome new Justice Department interference. We don't want them to come back in and reopen some matters which have been settled after long years of hard work.

Third, among the mayors this is not a partisan—that is, Republican or Democrat—question, as the testimony of the assistant attorney general and the comments by the Republican members of your panel during his presentation might indicate—that the Democrats are for affirmative action and the Republicans are against. That is not true, at least among the mayors.

In the Conference of Mayors, the most outspoken mayors publicly so far against the Justice Department and what the assistant attorney general is doing have been Republicans led by a former Member of this House Bill Hudnut of Indianapolis.

Thank you, Mr. Chairman.

I ask that this be submitted for the record.

Mr. **Edwards**. Without objection, it is so ordered.

Mr. **Gunther**. Thank you.

[The statement of Mr. Gunther follows:]

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STATEMENT BY

JOHN J. GUNTHER

EXECUTIVE DIRECTOR

U.S. CONFERENCE OF MAYORS

before the

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

COMMITTEE ON EDUCATION AND LABOR

and the

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

COMMITTEE ON THE JUDICIARY

JULY 11, 1985

Chairman Martinez, Chairman Edwards, and members of the Subcommittees, I am John J. Gunther, Executive Director of the United States Conference of Mayors. I am pleased to have the opportunity to appear before you this morning because the issues you are considering are of particular importance to the nation's mayors. In 1982 the Conference adopted a policy, which is attached, in support of affirmative action. Affirmative action has worked in many of our cities. Affirmative action has been an invaluable tool for cities in their efforts over the past two or three decades to make up for past wrongs in employment and promotion policies. It has increased employment of minority group members and it has increased their upward mobility. At this time, however, we see a serious weakening of the federal role in assuring equal opportunity and affirmative action.

Equal employment opportunities are key to assuring an individual's ability to participate in the full range of benefits society has to offer. We have seen a strong historical precedence for affirmative action. Statutory efforts to prevent discrimination in employment can be traced to federal policy followed during World War II outlawing race discrimination by war contractors. Since that time a series of Executive Orders has expanded and refined this principle for federal contractors. In 1964, the Civil Rights Act was passed. It prohibits discrimination by all private employers. In 1972 that Act was extended to cover public employers as well.

Recognizing that the award of damages for past violations was not adequate, various courts and federal agencies have required employers to take concrete steps, complete with goals and timetables for measuring progress, to assure that members of a previously deprived class are hired and promoted without discrimination. Virtually all of the federal courts of appeals have ordered or approved such goals and timetables of hiring and promotion when necessary to remedy proven discrimination.

In addition to the legal and constitutional reasons that have been behind the various court decisions, we have seen evidence of the fact that affirmative action works. A U.S. Department of Labor report studying the effects of affirmative action plans mandated by the Office of Federal Contract Compliance Programs shows that businesses with affirmative action plans from 1974 to 1980 were able to increase minority employment by 20 percent. In those not covered by plans, minority employment was only increased by 12 percent. The participation of women in the workforce increased 15 percent in companies with plans, two percent in those without plans. A second study for the Labor Department completed in July, 1983 by Jonathan S. Leonard of the University of California -- who, I believe, testified before you yesterday -- reached similar conclusions regarding the effectiveness of affirmative action.

In addition to these two nationwide studies, enrollment statistics for higher education programs indicate the importance of affirmative action plans in increasing the percentage of minority students, thereby better preparing them for highly skilled employment. The enrollment of Black students in higher education has doubled in the past fifteen years. Affirmative actions plans have allowed women to enter positions formerly viewed as men's work and have contributed to the beginnings of educating employers about the feasibility of integrating older and disabled workers into their businesses.

Despite the historical precedent and the successes we have seen, the federal role in assuring equal opportunity and affirmative action has changed in recent years. The federal government now requires proof of intent to discriminate before taking remedial action to improve the race and sex composition of an employer's workforce. It no longer views patterns of inadequate representation of minorities and women as sufficient indications that remedial action is needed. Similarly, goals and timetables as means of achieving fair representation in the workforce are often opposed.

There have been budget cuts and staff reductions in many of the federal agencies charged with civil rights enforcement. The federal government only imposed one debarment of a federal contractor (loss of contract or prohibition against further bidding) between 1981 and 1983. In employment discrimination cases, the proportion of "no-cause" findings has increased by a third. Back pay awards for discrimination were reduced by 72 percent between 1980 and 1984.

THE STOTTS CASE

Relying on the Supreme Court's decision in the case of Firefighters Local Union No. 1784 v. Stotts, et al. The Department of Justice has requested that some 50 jurisdictions reconsider their affirmative action plans. By interpreting Stotts as ending race-conscious relief as a legal remedy to job discrimination, the Justice Department has called for the deletion of provisions in court orders and decrees that establish interim goals for the number of women or minorities to be hired.

The Justice Department's reliance upon Stotts to validate the position that the Supreme Court has struck down affirmative action is misplaced. The Stotts holding is much more limited, and stands for the proposition that an affirmative action plan cannot set-aside a bona fide seniority system absent a judicial finding of past or present discrimination. The Supreme Court clearly did not preclude the use of race-conscious affirmative action relief. Moreover, Courts of Appeals around the country have been consistent in giving Stotts this narrow interpretation.

Just last month at the 53rd Annual Conference of Mayors, we adopted a policy resolution on the Justice Department's interpretation of the Stotts case submitted by Mayors Coleman Young of Detroit and Tom Bradley of Los Angeles. The adopted policy of the Nation's mayors, which is attached to my statement:

- opposes the Department of Justice's interpretation that the *Stotts* ruling ended race-conscious goals as a legal remedy to job discrimination;

- opposes the Department of Justice's efforts to dismantle affirmative action plans developed by cities to achieve equal employment opportunities;

- finds the Justice Department's interpretation of Stotts to be overbroad and inconsistent with the Courts of Appeals around the country; and

- believes that consent decrees and court orders should remain intact and should not be subject to modification based on *Stotts* absent a clear repudiation by Congress and the Judiciary.

Cities have worked hard to develop affirmative action plans to address the complex problems of employment discrimination. They will continue to hold firm in their support of the concept of affirmative action relief to provide equal employment opportunities. We strongly oppose the Justice Department's attempt to overturn locally developed civil rights agreements. As Judiciary Committee Chairman Peter Rodino said:

"It's rather curious that an Administration so intent upon reducing the power of the federal government is so willing to use that power to overturn civil rights agreements reached at the local and state level. It would make much more sense for the Department of Justice to devote its time, energy and money to ending discrimination rather than reopening old wounds and conflicts that have been satisfactorily resolved."

Resolution No. 37

Affirmative Action Revisions

Mayor Coleman A. Young
Detroit

Mayor Tom Bradley
Los Angeles

1) WHEREAS, the Supreme Court ruled in the case Firefighters Local Union No. 1784 v. Stotts that an affirmative action plan could not interfere with a bona fide seniority system absent a judicial finding of discrimination; and

2) WHEREAS, the Stotts decision does not preclude race-conscious affirmative relief; and

3) WHEREAS, the Department of Justice has given Stotts a very broad interpretation and believes Stotts precludes all use of racial preferences in Title VII employment discrimination cases; and

4) WHEREAS, the Department of Justice has contacted some 51 cities, counties and states and has requested that they consider revising affirmative action programs based on its broad interpretation of Stotts; and

5) WHEREAS, the Department of Justice's interpretation of Stotts has been rejected by numerous Courts of Appeals and District Courts around the nation; and

6) WHEREAS, the reopening of these cases will have the undesired effect of increasing tensions in communities across the country; and

7) WHEREAS, the reopening of these cases will have the undesired effect of disrupting programs which have been successful in meeting the objective of providing equal employment opportunities; and

8) WHEREAS, cities have seen the positive effects from hiring practices outlined in consent decrees,

9) NOW, THEREFORE, BE IT RESOLVED that the U.S. Conference of Mayors opposes the Department of Justice's interpretation that the Stotts ruling ended race-conscious goals as a legal remedy to job discrimination; and

10) BE IT FURTHER RESOLVED that the U.S. Conference of Mayors opposes the Department of Justice's efforts to dismantle affirmative action plans developed by cities to achieve equal employment opportunities; and

11) **BE IT FURTHER RESOLVED** that the U.S. Conference of Mayors finds the Justice Department's interpretation of Stotts to be overbroad and inconsistent with the Courts of Appeals around the country; and

12) **BE IT FURTHER RESOLVED** that the U.S. Conference of Mayors believes that consent decrees and court orders should remain intact and should not be subject to modification based on Stotts absent a clear repudiation by Congress or the Judiciary.

Projected Cost: None

Affirmative Action

WHEREAS, minorities and women represent specific groups that traditionally have been excluded or discriminated against in matters of employment; and

WHEREAS, in and of themselves, good faith efforts to achieve equal employment opportunities for minorities and women have been on the whole unsuccessful; and

WHEREAS, obvious exclusion and discrimination against minorities and women persists thereby proving that government policy alone does not overcome the effects of past discrimination; and

WHEREAS, affirmative action efforts constitute successful procedural and legal remedies to overcome specific exclusion of and discrimination against specific groups in matters of employment; and

WHEREAS, affirmative action bars most federal contractors, including schools and colleges, from excluding or discriminating against protected classes such as minorities, women, and disabled persons,

NOW, THEREFORE, BE IT RESOLVED that the U.S. Conference of Mayors supports affirmative action as an appropriate tool in the national effort to provide and ensure equal employment opportunities for under represented groups and protected classes particularly minorities, women, and the disabled who long have been subjected to exclusionary and discriminatory practices; and

BE IT FURTHER RESOLVED that the U.S. Conference of Mayors opposes the concept of "good faith efforts" in and of themselves, as the standard by which federal contractors should be judged for compliance with federal affirmative action regulations; and

BE IT FURTHER RESOLVED that the U.S. Conference of Mayors calls on the United States Congress to ensure that the principle of "good faith efforts" carries with it adequate monitoring and enforcement requirements so as to achieve realistic affirmative action goals and timetables.

Mr. **Edwards**. Thank you very much, Mr. Gunther.

We are not partisan here either, actually. We have quite a number of Republicans in the House sensitive to this issue and on our side, and we have some Democrats on what we consider to be the other side. However, we don't find any give at all, to speak of, in the administration, except the recent statements made by Mr. Brock. If you were here this morning, Wm. Bradford Reynolds, Assistant Attorney General for Civil Rights, gave a fainthearted, unenthusiastic hurrah for affirmative action; but it was a very limited type of affirmative action, with no teeth in it whatsoever.

We are, frankly, having great difficulty with the administration on civil rights, not only on this area but in every other area of civil rights. It's just like when Congressman Hawkins and I came here nearly a quarter of a century ago. We had a type of apartheid in this country then. We have fought our way out of it, with too many fine people being killed, a lot of blood, and sweat, and tears. Now it seems we're going back, and it's really heartbreaking, just terribly distressing.

Are there questions?

[No response.]

Mr. **Edwards**. I think we do deeply appreciate the fact that you people, representing the mayors of our cities are here today. I think it's very, very important that this message got through.

Yesterday, a witness representing the views of the National Association of Manufacturers came and gave the same kind of hard-hitting testimony that you did, with the same message, and that's very helpful, too.

You know, we're terribly concerned in this country today about unrest in societies throughout the world, and terrorism, and all of the things that unjust societies cause, and we don't want that to happen here. We want to have a fair and equal society where opportunity is for everyone. That's the name of civil rights.

Do you agree with that, that the enforcement of the civil rights laws in our country are the heart of our effort to have a peaceful society because a society is not going to be peaceful unless it's fair?

Mr. **Milner**. Most certainly. When you have discriminatory practice, and you have high unemployment, and you have people left out of the system, that creates the type of situation we faced in the 1960's in America. We thought we had ended that, and, as you said, now it seems that we're going back to those days. I do fear for our Nation if that were to happen.

Mr. **Gunther**. I think it's very important, Mr. Chairman, that the mayors, white as well as black, have made it very clear, in the past as well as at the recent annual meeting, that they do not want to go back and reopen these old wounds.

Mr. **Edwards**. Well, we are very, very grateful for that view. It's an important part of the record, and I hope that the rest of the country pays attention to what the mayors' organizations testified to.

The chairman of the subcommittee of the Education and Labor Committee has returned from the floor.

Mr. Martinez.

Mr. **Martinez**. I have no questions. I just would like to say again that all of your testimonies here have at least affixed in my mind that affirmative action is working, the policy should be continued. The interpretations of the present person in charge of affirmative action at the Justice Department are not right, and we have to do what is needed to make sure that the progress we've made over the past 30 years is not negated.

Mr. EDWARDS. If there are no further questions, we thank the witnesses, and we thank all of the witnesses for being here today.

[Whereupon, at 1:05 p.m., the subcommittees were adjourned.]

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